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# **Defining Consumer Ombudsmen: A Report for Ombudsman Services**

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# Executive Summary

## ***Purpose of the research***

This report seeks to describe consumer ombudsmen as they have developed in the United Kingdom. The recent European Union *Directive on Consumer Alternative Dispute Resolution* (2013/11/EU) defines consumer dispute resolution mechanisms in general, but does not distinguish between them individually. It does not, for instance, distinguish between consumer ombudsmen, arbitrators and adjudication schemes. Other existing approaches to definition, such as the Ombudsman Association's criteria for 'ombudsman membership', provide principles for ombudsmen in general, but do not distinguish between public ombudsmen and consumer ombudsmen.

Our task in this report, therefore, has been to describe the distinguishing features of consumer ombudsmen. Our approach, rather than seeking to provide a definition, has been to describe the key characteristics of consumer ombudsmen through comparison with other forms of dispute resolution and to situate consumer ombudsmen within the broader consumer protection landscape. Our view is that the fundamentally hybrid nature of consumer ombudsmen, combined with broader developments in the ombudsman and consumer dispute resolution landscape, have led to a lack of clarity and confusion in relation to the nature of consumer ombudsmen.

## ***Our approach in this report***

To address this lack of clarity, we have systematically compared consumer ombudsmen to: courts; consensual dispute resolution (such as mediation); other forms of consumer dispute resolution (such as arbitration schemes); and public ombudsmen. The aims of this comparative approach are two fold:

1. comparison allows us to highlight the distinctiveness of consumer ombudsmen in relation to other approaches to dispute resolution
2. comparison ensures a comprehensive approach which allows for all consumer ombudsmen's features and characteristics to be captured

Our research methodology involved a desk based literature review and ten qualitative interviews with experts in the field. This executive summary does not outline our findings for each comparison and is restricted to setting our overall conclusions. For a quick snapshot of our comparative analysis, please see the summary tables in Annex 5.

## ***The report's conclusions: functions, forms and limits***

The report's conclusions describe the features exhibited by consumer ombudsmen. To do so, we draw on Lon Fuller's (1971, 1978) notion of 'process pluralism' which is the idea that each process of dispute resolution has a particular set of 'functions', 'forms' and 'limits' which

provide it with a unique 'zone of competence'. Our starting point is to assume that consumer ombudsmen meet the current membership criteria set out by the Ombudsman Association and the European Commission's criteria for consumer ADR bodies; we then describe the functions, forms and limits of consumer ombudsmen as follows:

### Functions

The functions of consumer ombudsmen are:

- To provide independent resolution of disputes arising from contracts and transactions between consumers and private businesses
- To provide a strict alternative to the use of the courts and, additionally, to provide an equitable jurisdiction to provide additional consumer protection
- To provide advice and assistance to consumers in relation to their disputes, reducing the need for representation
- To equalise the balance of power between parties and identify, and provide special assistance to, the most vulnerable consumers to facilitate their access to redress
- To help consumers whose complaints are not valid understand why that is the case and help them move on from their dispute
- To raise standards amongst bodies subject to investigation by feeding back lessons that arise in decisions
- To enhance consumer confidence and trust in the sectors subject to investigation

### Forms

The principal forms of consumer ombudsmen include:

#### *Process characteristics*

- An impartial and fair process of dispute resolution, usually only available after a complaint has been made directly to a business
- A flexible, multi-process approach drawing on consensual and adjudicative forms of dispute resolution
- An inquisitorial fact finding and evaluative process (largely in writing or by telephone) with rare use of oral hearings
- A confidential investigation process which takes place in private (although outcomes may be published in anonymised or semi-anonymised form)
- An accessible and free process for consumers, with no requirement for them to be represented by legal advisers

#### *Decision making characteristics*

- Decisions that are binding on both parties, with no right of appeal, once accepted by consumers (but which do not constitute legal precedent)

- Decision making which begins by considering the legality of actions being complained about but which also features an equitable jurisdiction
- Decisions which consider the merits of the actions complained against in addition to the processes by which decisions were taken
- The use of flexible remedies (usually with a financial element) to provide fair and reasonable outcomes
- The use of expertise and industry knowledge to inform decision making in addition to the law
- The ability to facilitate, propose and impose solutions as part of their processes

#### *Governance characteristics*

- Governance arrangements ensure independence from industries and businesses under jurisdiction
- Can either be set up by industry (self-regulatory), by regulators (mandated self-regulatory) or the legislature (statutory)
- Funding comes from the industry through case fees and/or levies
- Tend to be considered closer to the self-regulatory or regulatory system than the justice system
- The figure of the ombudsman allows for high visibility and accountability

#### Limits

The role of consumer ombudsmen is limited as follows:

- While their decisions and other activities may influence the practices of those subject to investigation, consumer ombudsmen cannot provide authoritative and binding legal precedents such as those that could be issued by the higher courts
- While consumer ombudsmen have a special role in terms of providing direction to bodies subject to investigation about the requirements of fairness beyond minimum regulatory standards, they cannot create regulatory rules or standards
- While consumer ombudsmen are able to provide advice to consumers in relation to the handling of disputes and may seek to manage consumers' expectations, they should stop short of providing advice on the substantive merits of cases, since to do so could prejudice subsequent decision making and give the appearance of prejudgment and bias
- While consumer ombudsmen have a particular responsibility towards vulnerable consumers and must assist all consumers to present their best possible case, they must remain impartial and cannot advocate for the consumer

To conclude, therefore, our description of consumer ombudsmen in the UK has three dimensions. Consumer ombudsmen can be described as those independent dispute resolution bodies that:

- (1) meet the Ombudsman Association's current criteria for membership as an 'ombudsman member'
- (2) meet the European Commission's principles and criteria for consumer dispute resolution, and
- (3) demonstrate the functions, forms and limits we have described above.

### ***Some important caveats***

This description is offered with some important caveats. The first is that our description is based on a review of the literature, a small number of expert interviews and our own understanding of consumer ombudsmen. While these have been helpful in elucidating some of the key features of consumer ombudsmen, empirical fieldwork is required in order to explore the extent to which the characteristics we have outlined exist in practice. There may be a difference between what commentators, practitioners and academics think consumer ombudsman *should* be doing and what they *are* doing in practice.

We also recognise that the description we have provided is limited to presenting the dominant features of consumer ombudsmen in the UK. In trying to provide a descriptive summary, and given the diversity of practice that exists in this sector, there will inevitably be room for debate in relation to whether the features we identify do (or should) apply equally to all consumer ombudsmen. Questions may also be raised about how 'essential' the features we have identified are; even if they accurately represent current approaches, could different approaches be adopted in future?

We recognise, therefore, given the small scale of this project, that our conclusions are necessarily tentative and limited in scope. There is significant potential for further research and analysis to reach a fuller empirical understanding of the functions, forms and limits of consumer ombudsmen in the UK. There is also room for further debate and discussion around which of the features we have identified are truly *essential* to the consumer ombudsman model and which ones may be seen as peripheral.

Nonetheless, and despite these limitations, we hope that the report will help inform ongoing discussions amongst practitioners, policymakers and academics about consumer ombudsmen and the distinctive role they can play in helping consumers and businesses resolve their disputes.

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**“The Lion looked at Alice wearily. ‘Are you animal — or vegetable — or mineral?’ he said, yawning at every other word. ‘It’s a fabulous monster!’ the Unicorn cried out before Alice could reply.”**

**Lewis Carrol, *Through the Looking Glass***

# 1. Introduction

This introduction sets out the purpose of the report, the approach we have taken and the research methodology we employed in defining consumer ombudsmen in the United Kingdom.

## *Purpose of the report*

The recent Directive on Consumer ADR (2013/11/EU) ('the Directive') sets out requirements in relation to the availability and quality of consumer dispute resolution in EU member states. While the Directive provides a clear definition of consumer dispute resolution mechanisms as bodies which facilitate, propose or impose solutions to disputes arising from consumer contracts, it does not distinguish between the various forms of consumer dispute mechanisms. Such mechanisms include: arbitration schemes, complaint boards, tribunals, adjudication schemes, conciliation schemes, complaint departments within regulatory agencies, and consumer ombudsmen.

Indeed, there have been very limited attempts to define consumer ombudsmen as a distinct form of dispute resolution. While there are numerous definitions of ombudsmen in general, and while these have been modified over time to account for the development of consumer ombudsmen, there has been less interest in specifying and identifying the particular features of consumer ombudsmen. The purpose of this report is to begin making these distinctions and to prompt debate amongst policymakers, practitioners and academics about the functions, forms and limits of consumer ombudsmen.

We follow Gottehrer (2009, p. 5) in arguing that the task of definition is essential and that "Observers of the [ombudsman] institution should have a better definition than "We know one when we see it." Some, including a number of our expert interviewees, have argued that definition is limiting and unhelpful. While we are aware of the controversial nature of the task, and while we accept that both scholars and practitioners may prefer the *status quo*, we consider that, with the likely growth of consumer dispute resolution following from the Directive, there is now a pressing need for analytical clarity to be brought to the issue.

Commenting on ombudsmen in the American context, Gadlin (2000, p. 37) noted that "The role of the ombudsman is perhaps the least well understood in the field of alternative dispute resolution (ADR)". We agree. While the flexibility and adaptability of the ombudsman institution has been key to its success and is much feted in the academic literature, this has come at the cost of confusion for all but experts in the field. This report seeks to address this confusion by outlining the distinctive features of consumer ombudsmen (it should be noted that the report, although it draws on international perspectives, is restricted to considering how consumer ombudsmen have developed in the United Kingdom).

In working towards this goal, we have been influenced by the work of Lon Fuller (1971, 1978). Fuller first advanced the idea of 'process pluralism' and the notion that each method of dispute resolution has particular functions, forms and limits, which provide it with a unique 'zone of competence'. Fuller was concerned with highlighting the essential characteristics of mediation and adjudication and with understanding in which circumstances each dispute process should be preferred over others. In this report, we apply this approach to consumer ombudsmen and seek to identify their core functions, forms and limits, and the zone of competence to which they are most suited.

### *Research methodology*

The research involved a desk-based review of the academic and practitioner literature. In addition, we conducted ten qualitative, semi-structured interviews with experts in the field. These experts were selected purposively, to provide a range of insights into the topic. We aimed to have a balance of the following perspectives in our expert sample: academic and practitioner, national and international, public sector and private sector. The table below shows the final sample.

Table 1: research sample

<b>Interviewee</b>	<b>Reference</b>	<b>Method</b>
Public law academic	Academic 1	Telephone
Consumer law academic	Academic 2	Telephone
UK and Ireland public ombudsman	Ombudsman 1	Face-to-face
UK and Ireland public ombudsman	Ombudsman 2	Telephone
UK and Ireland public ombudsman	Ombudsman 3	Telephone
UK and Ireland consumer ombudsman	Ombudsman 4	Telephone
EU public and consumer ombudsman	International Ombudsman 1	Telephone
EU consumer ombudsman	International Ombudsman 2	Telephone
EU consumer ADR body	International CDR Body Manager	Telephone
Consumer policy expert	Consumer Policy Expert	Telephone

### *Structure of the report*

This report is in five parts. First, we outline the context and background in which consumer ombudsmen have developed and consider some important definitions which have been developed to date.

Second, we review the principles and values for consumer ombudsmen and consumer dispute resolution set out by the European Commission, the Ombudsman Association, the International Ombudsman Institute, and various ombudsman networks.

Third, we systematically compare consumer ombudsmen to other forms of dispute resolution. In our view, much of the existential angst that exists around the role of consumer

ombudsmen derives from a lack of clear distinction between them and other forms of dispute resolution. As a result, we compare consumer ombudsmen with:

- courts
- consensual dispute resolution (e.g. mediation)
- other forms of consumer dispute resolution (e.g. arbitration schemes)
- public ombudsmen

These comparisons have two aims: the first is to clear up confusion that results from the 'hybrid' nature of ombudsmen and the fact that they seem to draw on and incorporate approaches from other forms of dispute resolution; and the second is to use comparison as an analytical device for ensuring that a comprehensive description of consumer ombudsmen's characteristics is provided.

Fourth, we discuss the particular territory or 'domain' (Gilad 2008) occupied by consumer ombudsmen in the consumer protection landscape. This includes looking at their relationship with consumer advice and regulation and has the aim of identifying the distinct role that consumer ombudsmen are expected to play in relation to consumer protection.

Fifth, we draw on our comparisons and our analysis of consumer ombudsmen in the consumer protection landscape, to provide an overall summary of the functions, forms and limits of consumer ombudsmen.

#### *A note on terminology*

We have used the term 'consumer ombudsmen' in this report to refer to all ombudsmen who have jurisdiction over disputes that arise from contracts and transactions between individuals (and sometimes small companies) and private companies. We have preferred this term to others such as 'private ombudsman' or 'private sector ombudsman'. In our view, those terms lead to confusion with respect to whether the words 'private' and 'private sector' refer to the ombudsmen themselves or the bodies under their jurisdiction.

Some of the experts we spoke with, for example, took 'private sector ombudsmen' to refer only to ombudsmen which were private companies and operated under self-regulatory or mandated self-regulatory arrangements. They considered ombudsmen set up on a statutory basis to examine the actions of private companies, and who were therefore public bodies, to be 'public ombudsmen'. To avoid such confusion, we prefer to term consumer ombudsmen, which refers to all ombudsmen with a jurisdiction over disputes arising from consumer-business contracts and transactions.

## 2. Context and background

This section provides a brief account of the development of the ombudsman institution. It then considers existing approaches to defining ombudsmen, which have sought to account for the diverse way in which the institution has developed across the world. As well as highlighting some major distinctions between different types of ombudsmen, these definitions – along with insights provided by our interviewees – allow us to sketch out some of the core characteristics of the institution. Finally, the section introduces various models that have been used in the literature to help describe and understand the functions of ombudsmen.

### *The development of the ombudsman institution*

Controversy and confusion over the role of ombudsmen is due, in part, to the way in which the institution has developed. In the United Kingdom, Morris and James (2002) refer to three ‘generations’ of ombudsmen. The 1<sup>st</sup> generation ombudsmen emerged in the public sector in the 1960s and 1970s, with a remit to deal with complaints from citizens about maladministration on the part of public administrators. The *modus operandi* of these ombudsmen was investigation, reporting and recommendation, although over time their approach has focused more on dispute resolution.

The 2<sup>nd</sup> generation ombudsmen subsequently emerged in the private sector, largely on a voluntary basis, in the 1980s and 1990s, to deal with complaints from consumers about businesses. These consumer ombudsmen had new features, particularly the ability to make binding decisions and a jurisdiction which went beyond maladministration to allow the merits of decisions to be reviewed.

The 3<sup>rd</sup> generation of ombudsmen were born with the creation of the Financial Ombudsman Service (FOS) in 2000. Morris and James (2002) identify the distinctive features of this third generation as: massive size; integrated jurisdiction; move from the ombudsman as an individual decision maker to an ‘ombudsman service’; increased use of mediation and conciliation to complement formal adjudication; and governance arrangements that provided clearer separation from industry.

Since Morris and James (2002) were writing, the UK landscape has developed significantly. To account for this, we have previously described five phases of development in the ombudsman institution in the UK (Gill *et al* 2013). Phases 1 and 2 directly match Morris and James’ (2002) 1<sup>st</sup> and 2<sup>nd</sup> generation ombudsmen.

In phase 3, taking place in the 1990s and 2000s, we noted the consolidation of existing consumer ombudsman schemes in the financial services sector as well as an expansion of ombudsmen to cover other professional services such as legal services and estates agents. Phase 4 in our model, occurring during the 2000s, involved the development of ombudsman

schemes to cover hybrid public and private services such as universities and housing associations, as well as privatised regulated industries, such as energy and communications. Phase 5, also in the 2000s, came about as a result of devolution and resulted in a new breed of one-stop-shop public ombudsmen, who have since significantly developed the traditional UK public service ombudsman model (see, for example, Gill 2014 and Mullen and Gill 2015).

Developments in the UK have broadly been mirrored across the world: emerging out of Scandinavia in the 1960s, ombudsmen first spread to the public sector and then to the private sector. Taking the global perspective, there are two further developments in the ombudsman institution, additional to those we have already described above, which are significant:

- The increasing emphasis some public sector ombudsmen have given to human rights (Tai 2010) and anti-corruption (Reif 2004)
- The creation, largely in the United States but also in some EU states, of 'organisational ombudsmen', appointed by particular corporations or businesses to deal with complaints from employees and/ or customers (Rowe 1991)

These developments mean that, on a global scale, the ombudsman institution is now characterised by a great deal of what has been described, somewhat euphemistically, as 'functional diversity' (Abedin 2010); they operate in both the public and private sectors and have taken on a myriad forms in each of these. Indeed, several interviewees who took part in our research commented on the quite separate ways in which ombudsman schemes had developed. International Ombudsman 1 commented, for example, that in some EU countries public ombudsmen had a jurisdiction over privatised public services such as energy and telecoms, which was distinct from the approach that had been taken in the UK where separate consumer ombudsmen were created. Ombudsman 2 also noted that, in Sweden, consumer ombudsmen were a last resort, with most complaint handling carried out by regulators, which differed from the mass dispute resolution activities of consumer ombudsmen in the UK.

### *Categories of ombudsmen*

While not unique (see Carl 2012), the most comprehensive attempt at categorising the variations in the ombudsman institution that have evolved has been made by Linda Reif (2004). The table below is a slightly adapted version of the categories she identifies.

Table 2: categories of ombudsmen

Ombudsman	Features
<b>PUBLIC SECTOR</b>	
<b>Legislative ombudsman</b>	‘Classical’ ombudsman. Appointed by and reporting to legislature; established by law; jurisdiction over citizen complaint about government agencies.
<b>Speciality ombudsman</b>	Same as legislative ombudsman, but jurisdiction restricted to a single area (e.g. Children’s Rights, Police, etc.)
<b>Hybrid ombudsman</b>	Same as legislative ombudsman, except also has express mandate to consider citizen complaints about human rights and corruption.
<b>Supranational ombudsman</b>	Same as legislative ombudsman, but established on an international scale (e.g. European Ombudsman).
<b>Executive ombudsman</b>	Appointed by and reporting to executive branch of government; established by law or executive action; jurisdiction over citizen complaints about government agencies.
<b>Executive organisational ombudsman</b>	Appointed by and reporting to a single agency or government department; established by internal instrument within agency; complaints can be received from customers of the agency and/or employees.
<b>International organisational ombudsman</b>	Appointed by and reporting to head of an international organisation; deals with complaints from employees about the organisation.
<b>PRIVATE SECTOR/ HYBRID</b>	
<b>Hybrid industry ombudsman</b>	Established by law; appointed by or reporting to legislative or executive government; jurisdiction over consumer complaints about businesses within a particular service sector or industry. This ombudsman is a ‘hybrid’ because it is a public body, set up by law, with a private sector jurisdiction.
<b>Self-regulatory industry ombudsman</b>	Established by agreement within an industry; appointed and reporting to an umbrella organisation set up by industry (but containing mixed members); jurisdiction over consumer complaints about businesses participating in the scheme.
<b>Corporate organisational ombudsman</b>	Established by institution or company; jurisdiction over internal workplace matters and/or external complaints by customers.

For our purposes, two points are worth making in relation to Reif's (2004) categorisation. The first is that it demonstrates, through its many categories, why scholars and practitioners have been concerned that – as the ombudsman has developed around the world – the institution has somehow become distorted (Abedin 2010). Some writers have claimed that the use of the title ombudsman in the private sector represents an attempt to borrow the legitimacy and status of the classical ombudsmen, without always having the same degree of independence or powers (see Stuhmcke 1998 for a discussion of this point). Others have been concerned by the idea that the spread of the ombudsman institution has led to confusion or dilution (Gadlin 2000; Stieber 2000). Ombudsman 3 picked up on this point and told us that ombudsman models operating internationally could not be reconciled, given the major difference in role, function and operating practice between them. She noted:<sup>1</sup>

"I think what I have learned... across Europe and North America is that there are so many different models of what constitutes an ombudsman that the term is essentially contested, it's ambiguous and we'd all be wasting our time if we tried to say our model is the only appropriate one". (Ombudsman 3)

The second point in relation to the table above is that Reif (2004) highlights a major distinction between types of consumer ombudsmen: those set up by governments on a legal basis, which are public bodies; and those set up by industries themselves on a voluntary basis, which are private bodies. We can add a third category that we might call, following a suggestion from Academic 2, 'mandated self-regulatory': those ombudsmen which are private bodies but which are set up as a result of action on the part of a regulator. An example of this approach in the UK is provided by Ombudsman Services: Energy, a not-for-profit private organisation who provide an ADR service under contract with the energy regulator, Ofgem. The diversity in the governance arrangements for consumer ombudsmen is an important characteristic, which was commented on by a number of experts in our interviews.

Ombudsman 4, for example, commented on the different types of consumer ombudsmen and argued that in sectors where there was a significant imbalance of power, the hybrid, statutory model should be preferred. She considered competition between private schemes in such sectors was inappropriate and could lead to standards being lowered as businesses were able to choose schemes that would best serve their interests. Ombudsman 2 agreed and argued that in areas where there was a strong public interest, statutory schemes were required.

The International CDR Body Manager did not fully share this view. She argued that statutory intervention was necessary in some sectors, but that it would depend on the context. This was also the view of International Ombudsman 1 and International Ombudsman 2, who

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<sup>1</sup> All research participants cited in this report are referred to as 'she'.



argued that different models could operate effectively if properly constituted. There was, however, no support expressed amongst interviewees for competition between schemes. Academic 2, for example, noted that there should not be more than one scheme in each sector. We will return to some of these arguments below.

In the UK context, we note that several of the categories referred to by Reif (2004) would not meet the Ombudsman Association's current criteria for recognition as an ombudsman. Indeed, executive ombudsmen, executive organisational ombudsmen, executive international organisational ombudsmen and corporate organisational ombudsmen would all fail to meet the independence criteria required by the Ombudsman Association and the International Ombudsman Institute (see below).

While Reif's (2004) classification is helpful in understanding the distinctions between ombudsmen, it is limited in largely being restricted to governance issues (e.g. method of appointment) and the nature of the ombudsman's jurisdiction (e.g. public or private). It does not consider broader issues around how ombudsmen operate. Various attempts at providing specific definitions of ombudsmen have, however, helped to flesh out this point.

#### *Ombudsmen definitions*

The longest standing definitions of ombudsmen are those which emerged to describe the original 'classic' ombudsmen (the 'legislative ombudsman' to use Reif's category). There are a number of definitions to choose from, however, the International Bar Association's definition is one of the most comprehensive:

"An office provided for by the constitution or by an action of the legislature or parliament and headed by an independent, high-level public official who is responsible to the legislature or parliament, who receives complaints from aggrieved persons against government agencies, officials, and employees or who acts on his own motion, and who has the power to investigate, recommend corrective actions, and issue reports." (cited in Seneviratne 2002, p. 8)

The key features of the public ombudsmen are, therefore: the high public status of the ombudsman; independence from executive government; appointment by the legislature; a remit to deal with complaints about government agencies; and the power to investigate, report and recommend. The development of consumer ombudsmen in the private sector has clearly challenged this definition of ombudsmen, with its emphasis on government action and governance arrangements that directly involve the legislature.

As a result, there have been various attempts to provide definitions of ombudsmen which are broad enough to cover both public and private sector ombudsmen. James (1997) provides a helpful overall definition, which also seeks to distinguish private sector ombudsmen:

"As a working definition I suggest that an ombudsman is an independent person who can receive complaints, investigate them, and direct or recommend a remedy where the complaint is found to be justified. For my purposes, I am taking 'private ombudsmen' to be one who deals with complaints against private organisations rather than public ones, although that distinction... masks a rather more complicated reality" (James 1997, p. 3)

This approach echoes a definition offered to us during our interviews by Academic 1 who, while noting the difficulty of the task, suggested the following definition:

"A private sector ombudsman scheme is an independent scheme set up with a role predominantly to investigate, resolve, determine or make recommendations with regard to complaints against bodies operating in the private sector." (Academic 1)

This approach distinguishes consumer ombudsmen primarily in terms of the nature of the (private) bodies they oversee. While this is clearly a key distinguishing feature between public and consumer ombudsmen, we will see below that there are some further important distinctions that can be made to help us distinguish between these two key 'breeds' of ombudsman.

Others have attempted to provide very high level definitions, broad enough to cover all of Reif's (2004) ten categories:

"Ombudsmen act rather like umpires in complaints brought by individuals against public or private organisations" (Blake *et al*/2013, p. 249)

"Third party complaint handling institutions in general and ombudsmen in particular are commonly conceived as democratic mechanisms for holding public and private services accountable to citizens and consumers" (Gilad 2008, p. 227)

"The ombudsman is used internationally as a simple and effective device for correcting bureaucratic misdeeds. The uniqueness of the ombudsman concept – of having an institution where a neutral grievance handler is used as a last resort to assist resolution of a dispute – is that it is suited to any situation where administrators make decisions concerning an individual's welfare." (Stuhmcke 2002, p. 79)

These definitions are helpful in setting out something of the conceptual core of the ombudsman institution as it operates in both the public and private sector: they provide neutral, independent resolutions to individual disputes; they help citizens and consumers hold large organisations to account; and they are particularly suited to situations where organisations have the power to affect individual lives and interests.

A further definition, which we find particularly useful in that it highlights the processes used by ombudsmen in addition to their functions, has been provided by the Office of Fair Trading (2010) in their review of the consumer redress landscape in the UK:

“...ombudsmen are independent, impartial intermediaries who consider complaints. The particular mechanisms of ombudsman schemes vary but they often combine neutral fact-finding, mediation and adjudication in various tiers.” (Office of Fair Trading 2010, p. 2)

This definition develops our understanding by pointing to the fact that ombudsmen generally employ a multi-tiered process that involves elements of investigation and consensual dispute resolution methods. This confirms that ombudsmen processes have shifted over time and that the ‘modern purpose’ of ombudsmen has been to resolve complaints by any appropriate means (rather than purely through investigation and reporting) (Seneviratne 2002).

Our interviewees broadly concurred with the definitions above and the core functions and characteristics of ombudsmen they highlight. In particular, independence and impartiality was seen by all interviewees as the foundation of the ombudsman’s role. The Consumer Policy Expert highlighted four key functions that were central to consumer ombudsmen:

- they are an informal system to resolve complaints outside the court system
- they investigate and seek to resolve complaints in an impartial way
- they use intelligence from complaints to raise standards
- they increase consumer confidence in the relevant industry

While providing a slightly different emphasis, Ombudsman 3 identified the following three core functions:

- to provide redress to groups or individuals
- to promote good practice in the sector they are overseeing
- to promote public and user trust in the bodies subject to investigation

Ombudsman 4 agreed that individual dispute resolution, standard raising and enhancing consumer confidence were key to the ombudsman role. She laid particular emphasis, however, on the special role of ombudsmen in relation to delivering fairness; indeed, she saw the idea of equitable decision making as being a principal distinguishing characteristic of ombudsmen:

“Ombudsmen should assert and feel comfortable that their speciality and their capability is all around being able to judge fairness, [being] able to deliver answers that people understand and [that] feel fair. That’s what we should be professionals in, in the same way judges would assert their ability to make legally correct decisions.” (Ombudsman 4)

The Consumer Policy Expert agreed that ombudsmen had a role in going beyond the law when looking at complaints, and also considered that the provision of advice to consumers and efforts to be accessible to vulnerable consumers were key characteristics. International Ombudsman 2 noted that having a special mission to help the most vulnerable was important to the ethos of ombudsmen. A list of all the characteristics mentioned by interviewees in the course of interviews can be found in Annex 1.

While these definitions, and the data provided by our interviewees, provide a helpful extension to the definition of the 'classical' ombudsman and while they make room for consumer ombudsmen, they are less helpful in terms of distinguishing what particular features consumer ombudsmen have. Indeed, definitional efforts in the literature have tended to involve trying to find a holistic definition of the ombudsman institution, rather than trying to define and distinguish the particular features of the consumer ombudsmen. Where distinctions have been made these have generally been rather critical and have involved taking a public sector-centric view of the ombudsman institution. Abedin (2010, p. 922), for instance, concludes his discussion of private sector ombudsmen by stating: "It is definitely questionable whether the holders of these offices should be called ombudsman at all".

This report will leave behind the debate about whether consumer ombudsmen are 'true' ombudsmen; we take it as self evident that ombudsmen have equal legitimacy in the public and private sector as long as they are properly designed and meet certain core principles.

### *Ombudsman models*

In addition to providing classification systems and definitions, the literature suggests a number of models to help explain the role and functions of ombudsmen. Harlow and Rawlings (2009), for example, talk of the 'fire-fighting' and 'fire-watching' models; the models have also been referred to as 'redress' and 'control' by Heede (2000). The former involves ombudsmen being primarily concerned with individual dispute resolution and providing remedies that will redress individual injustice. The latter involves ombudsmen being primarily concerned with using complaints to generate systemic change and lead to improvements in service provision that can benefit the public more generally.

It is now widely recognised that all ombudsman schemes fulfil both of these roles, albeit to different extents. Assessments of UK ombudsmen have tended to conclude that the UK ombudsman model is predominantly a fire-fighting/ redress one (Gilad 2008; Seneviratne 2002; Thomson 2006), although more recent assessments have suggested some movement towards a more fire-watching/ control approach (Buck *et al*/2011; Gill 2014).

The fire-fighting/ fire-watching model has subsequently been elaborated by other authors. Snell (2007), for example, has suggested that a third approach, 'fire-prevention', should be added to Harlow and Rawlings' (2009) model in order to account for the increasing role of

some ombudsmen (particularly in Australia) in audit and inspection activities. Fire-prevention involves not only looking for opportunities to generate systemic change through individual complaints, but also the proactive supervision of services to try to ensure systemic problems do not arise in the first place.

Stuhmcke (2012) has attempted to provide greater analytical clarity around the extent to which ombudsmen are fulfilling either reactive (redress) or proactive (control) functions. She outlines three ombudsman models: the Reactive Ombudsman Model (ROM), the Variegated Ombudsman Model (VOM) and the Proactive Ombudsman Model (POM).

- The ROM is essentially the same as Harlow and Rawling's fire-fighting model; it involves a primary concern with the redress of individual grievances, with only a limited concern for pursuing service improvement activities.
- The VOM involves a much greater emphasis on pursuing systemic change and the development of new functions such as audit and inspection; however, the focus and core purpose of the organisation remains on individual dispute resolution.
- The POM involves a more proactive orientation and the key difference with this model is that the ombudsman ceases to be primarily a mechanism for the redress of individual grievances. Instead, ombudsmen that conform to this model see the individual complaint only as the vehicle for pursuing systemic improvement activities and will only consider those complaints that have potential to assist in this regard.

A final model has been developed by Gilad (2008) in her empirical study of the Financial Ombudsman Service. She found that the existing redress and control models did not fully explain the activities she observed when conducting her research. In particular, she found that ombudsman staff devoted considerable effort to 'therapeutic' complaint handling activities, which effectively involved letting consumers down gently and helping them to understand why their complaint could not be upheld. Gilad (2008) refers to this role as 'expectations management' and states that it involves reshaping consumers' perceptions of their disputes in such a way that they feel able to move from a dispute.

Overall, the models in the literature highlight three important aspects in terms of the way in which ombudsmen operate: they resolve individual disputes; they seek to promote change and improvements in services (but to varying extents); and they have, arguably, adopted a therapeutic approach, which seeks to help aggrieved citizens and consumers better to understand the problems they have experienced.

### 3. Core values and principles

Gottcher (2009) argues that defining ombudsmen is best done by reference to the principles that underlie the institution. He suggests that this helps avoid the problem that often occurs when people seek to define ombudsmen: they have a particular ombudsman in mind and describe its features, often forgetting that significant variations exist between different schemes. The principles suggested by Gottcher (2009) and which he considers should form the 'fundamentals' of an ombudsman institution are: independence; impartiality and fairness; credible review process (by which he means effectiveness); and confidentiality.

Other principles relevant to consumer ombudsmen have been set out by a variety of organisations and in this section we highlight these and review the approaches taken to date.

#### ***Ombudsman Association (OA)***

The Ombudsman Association (formerly the British & Irish Ombudsman Association) was established in 1993 and describes itself as being 'a professional association for ombudsmen and complaint handlers, their staff and others interested in the work of independent complaint resolution' (Ombudsman Association 2015). Membership of the Ombudsman Association is open to those persons who satisfy the defined criteria for recognition in the United Kingdom, Ireland, Britain's Crown Dependencies and Britain's Overseas Territories.

In addition to providing services to members, facilitating mutual learning between schemes and working to raise the profile of ombudsmen, the current (April 2015) stated objects of the Association are to:

- encourage, develop and safeguard the role and title of ombudsmen in both the public and private sectors; and
- define, publish and keep under review the Criteria for the Recognition of Ombudsman Offices by the Association (Ombudsman Association 2015).

The Ombudsman Association currently has three categories of membership: Ombudsman, Complaint Handler and Associate. Ombudsman Membership of the Association is open to schemes which meet the Criteria for Recognition of Ombudsman Offices set out in Schedule 1 attached to the Association's Rules. These five criteria are: independence of the ombudsman from those whom the ombudsman has the power to investigate; effectiveness; fairness; openness and transparency and public accountability (see Annex 2).

Complaint Handler Membership is open to organisations which have complaint handling as a significant part of their role and which operate in accordance with the Association's Principles of Good Complaint Handling, but do not meet the Association's Criteria for the Recognition of Ombudsman Offices. The Requirements for Complaint Handler Membership

are attached as Schedule 2 to the Rules (see Annex 2). Associate Membership (Corporate and Individual) is open to any individual (Individual Associate Member) or organisation (Corporate Associate Member) who, in the opinion of the Executive Committee, is interested in and supports the objects of the Association.

These principles and membership criteria are likely to change. The Executive Committee of the Ombudsman Association carried out a strategic review of the Association's Objects and Membership Criteria, consulting the Membership in March 2015 on the proposals for implementation. A review conclusion was that the governance of the Association be amended to provide members with an equal say through a universal membership status. Accordingly, it is understood at the time of writing this report that the Association proposes to amend its Objects and Membership Criteria and move to having universal membership.

This proposal, to be approved at the Ombudsman Association AGM in May 2015, is for universal voting membership to be open to institutions and organisations that substantially meet the following criteria, which are based on the International Ombudsman Institute's (IOI) principles (see below and Annex 3) and the European Commission's criteria for the independence of ADR entities (see below and Annex 4):

- Respect for human rights, administrative justice and procedural fairness, improving services, open and accountable government and access to justice for all (Summary of IOI purpose)
- Seek to protect persons against injustice caused by maladministration or other fault
- Independence from bodies within jurisdiction and users of services
- Necessary powers of investigation and authority to recommend remedy
- Confidentiality and impartiality of decision-making
- Transparent operational processes designed to achieve consistency and timeliness in line with appropriate recognised standards
- Accountability through public reporting including performance assessment
- Adequate funding to fulfil functions with no financial imposition on complainants
- Easily accessible following initial tier complaint procedures with special consideration for vulnerable groups
- Engagement with stakeholders to ensure public awareness and maximum impact

For those in the public sector, it is understood that the Ombudsman Association intends for the designation 'Ombudsman' to be restricted to those who meet the IOI's voting membership criteria. However, their review recognised the absence of a recognised

international standard for private sector ombudsmen. It is anticipated that the present research will assist to define the unique features of an ombudsman operating in the private sector, beyond the criteria laid down by DG SANCO for the independence of ADR entities (see Annex D for these criteria, as provided by Ombudsman Association to their members as part of the review process).

### ***The International Ombudsman Institute (IOI)***

The International Ombudsman Institute (IOI) was established in 1978. It is a worldwide organisation of ombudsman offices and incorporated as a non-profit organization. The core purpose of the IOI is set out in By-laws, which affirm and elaborate a set of principles which reflect the principles relating to the status of national institutions for the promotion and protection of human rights, i.e. the Paris Principles, and United Nations Resolutions on the Role of the Ombudsman.

Any institution, organization or individual which supports the purposes and principles expressed in Article 2 of the By-laws (see Annex 3) is entitled to be a member of the IOI. Voting membership is restricted to public institutions with an international, national, regional or local jurisdiction which fulfil the criteria set out in Article 6.2 (a-c) of the By-laws. These are that the institution:

- a) substantially demonstrates that it has achieved the purpose and principles enshrined in Article 2, in conformity with the Country, State, Regional or Local constitution or legislation.
- b) receives and investigates complaints from individuals against the administrative practices of public authorities or public undertakings, and
- c) is functionally independent of any public authority over which jurisdiction is held.

### ***International Network of Financial Ombudsman (INFO)***

The International Network of Financial Services Ombudsman (INFO) was established in 2007. The overall aim of the INFO Network is for member schemes to work together to develop their expertise in dispute resolution, by sharing experiences. Schemes which are INFO members (so far as it is within their control) are expected to aspire to comply with six fundamental principles agreed by the membership:

- independence, to secure impartiality
- clarity of scope and powers
- accessibility
- effectiveness
- fairness
- transparency and accountability.



The INFO web site describes an ombudsman scheme or office as providing an independent, impartial, fair, timely, efficient and informal external dispute resolution process that is free to consumers. It says that this form of alternative dispute resolution is also commonly known as external dispute resolution (EDR), because it is independent of and external to the companies that are being complained about. Also, that ombudsmen resolve consumer complaints on the basis of fairness — through mediation, conciliation, investigation and where necessary issuing a recommendation/decision.

### ***National Energy Ombudsman Network (NEON)***

The National Energy Ombudsman Network (NEON) is an independent, not for profit Europe-wide network made up of ombudsmen and mediation services in the energy sector, who are recognised as independent providers of alternative dispute resolution (ADR) in their respective countries and regions, consistent with EU directives 2009/72 and 73 ("Third Energy Package") and Directive 2013/11 on alternative dispute resolution for consumer disputes and Regulation (EC) No 524/2013 on online dispute resolution for consumer disputes.

Their stated objectives are to promote ADR in Europe in compliance with the recommendations of the Commission and EU Directives; to encourage the protection and empowerment of energy consumers; to represent its members at European level and to link up with European counterparts in the fields of energy and consumption; and to facilitate the exchange of information, experience and good practices among members.

NEON set out their values as being:

- To facilitate the exchange of information, experience and good practices among members.
- Independence: our services are completely independent from the industries we handle complaints for; they have no control over our activity, which guarantees our impartiality;
- Transparency: we publish annual reports, recommendations, details on our funding and performance indicators;
- Respect for the principles of natural justice and human rights;
- Have regard to any relevant legislation, contract, regulatory provision, and codes of conduct or practice; and
- Efficiency.

Consideration of the principles set out above and in Annexes 2-4 reveals that independence is considered to be an essential principle common to all. In relation to this, it is noted that in 2014, the Sindic de Greuges de Catalunya (Catalan Ombudsman) published research into the international defining elements of the role of ombudsmen in today's democracies in their

report entitled "International Framework of the Ombudsman Institution". Amongst other issues, a conclusion of the Catalan Ombudsman's report was that:

"Without exception, the international framework underscores the ombudsman institution's independence as one of its inherent traits. For that reason, it is necessary that the legal statute of the office-holder as well as the organizational structure provide the institution with the maximum independence and neutrality." (Catalan Ombudsman 2014).

We will consider the role of the office holder and the structure of consumer ombudsman organisations in next section of the report. This research by the Catalan Ombudsman also highlights the importance of ombudsmen having both organisational and budgetary autonomy. This is a principle which presents some challenges for consumer ombudsmen to demonstrate in reality and in practice, being dependent as they are (in the main) on funding from bodies under jurisdiction and on having close relationships with the relevant regulator(s). We will also touch on these issues in the next section of this report.

## **4. Consumer ombudsmen in comparative perspective**

Our discussion of consumer ombudsmen in the following sections of this report takes as its starting point that these organisations already meet the principles set out by the Ombudsman Association, the European Commission, INFO and NEON. Our view is that any dispute resolution body that does not conform to those principles and values cannot be legitimately termed a consumer ombudsman.

We now turn to the analytical core of the report; in the following sections we will seek to identify some of the principal characteristics of consumer ombudsmen by systematically comparing them with:

- Courts
- Consensual dispute processes (such as mediation)
- Other forms of consumer dispute resolution
- Public ombudsmen

As noted in the introduction, we have chosen to use this comparative analysis approach for two reasons:

1. comparison allows us to highlight the distinctiveness of consumer ombudsmen in relation to other approaches to dispute resolution
2. comparison ensures a comprehensive approach which allows for all consumer ombudsmen's features and characteristics to be captured

### Comparison 1: consumer ombudsmen and courts

Of the various areas that require distinction, this is perhaps the most straightforward and least contentious. Figure 1 below provides an outline of the features which are shared between consumer ombudsmen and courts, and those features which are unique to each institution.

Figure 1: shared characteristics and distinguishing features between courts and consumer ombudsmen

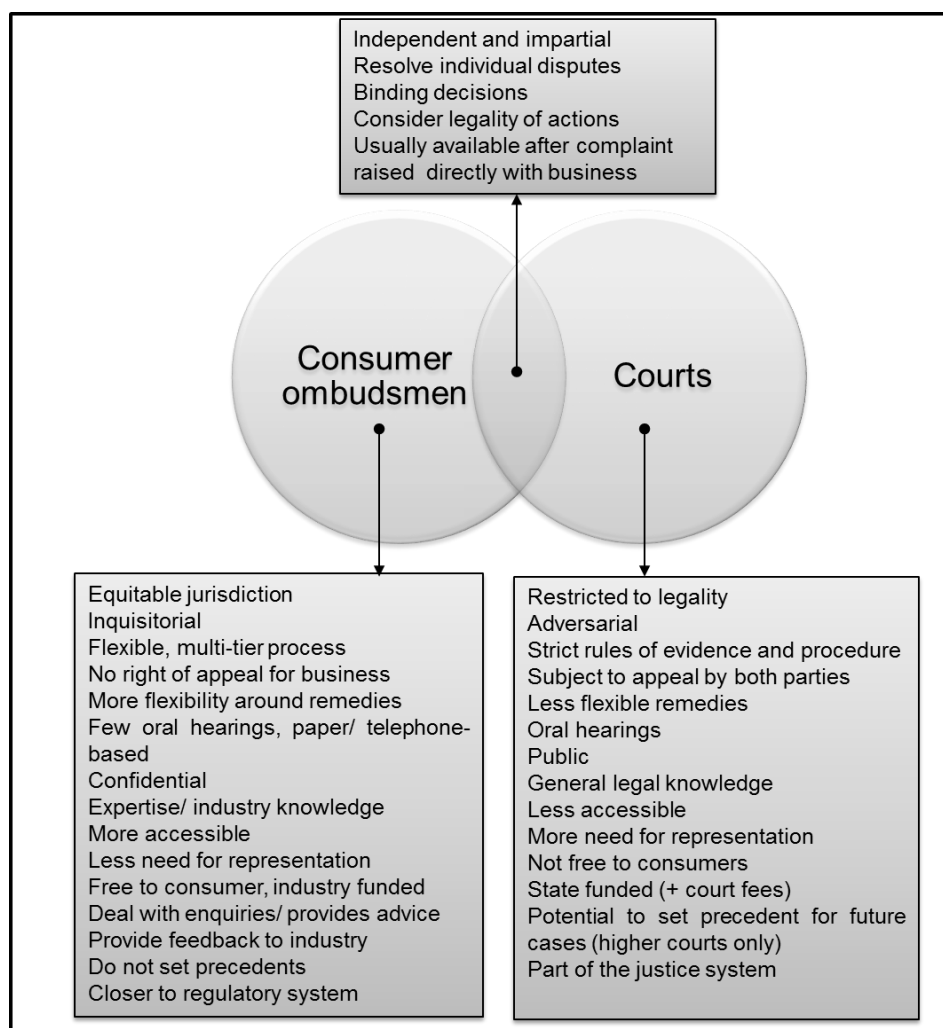


Figure 1 shows that courts and consumer ombudsmen share some common ground (in this Venn diagram and those that follow, shared features are shown in the box above the diagram). They are, for instance, both fundamentally involved in the business of considering and determining individual disputes (Thomas and Frizon 2012). They are also both empowered to take binding decisions (Morris 2008), although in the case of consumer ombudsmen, decisions tend to be only binding on the business (exceptions include the UK Pensions Ombudsman and the Irish Financial Services Ombudsman Bureau). They also both, generally, consider the legality of administrative action (O'Shea 2006) and relevant law is a

key aspect of decision making for both courts and consumer ombudsmen. Beyond this, however, the courts and consumer ombudsmen are quite different.

The particular features that distinguish consumer ombudsmen from courts are shown in Figure 1 and can be broken down into four areas: functions; process characteristics; decision making characteristics; and governance characteristics. Table 3 below outlines the shared characteristics and distinguishing features of courts and consumer ombudsmen in this way.

Table 3: shared characteristics between courts and consumer ombudsmen broken down by functions, process, decision making and governance characteristics

<b>Shared characteristics</b>	<b>Consumer ombudsmen distinctions</b>
<p><i>Functions</i></p> <ul style="list-style-type: none"> <li>• Resolve individual disputes</li> </ul>	<p><i>Functions</i></p> <ul style="list-style-type: none"> <li>• Provide advice and support to consumers in relation to their complaint</li> <li>• Provide feedback to industry and seek to raise standards</li> <li>• Have a special concern for vulnerable consumers</li> </ul>
<p><i>Process characteristics</i></p> <ul style="list-style-type: none"> <li>• Impartiality</li> </ul>	<p><i>Process characteristics</i></p> <ul style="list-style-type: none"> <li>• Are confidential and conduct processes in private</li> <li>• Are more accessible, as a result of their advisory functions /inquisitorial approach</li> <li>• Are free to the consumer</li> <li>• Are inquisitorial, with strong powers of investigation</li> <li>• Employ a multi-process approach, which can be used flexibly</li> <li>• Rarely use oral hearings, and are paper and telephone based</li> <li>• Do not require legal or other kinds of representation</li> </ul>
<p><i>Decision making characteristics</i></p> <ul style="list-style-type: none"> <li>• Binding decisions</li> <li>• Consider legality of actions</li> </ul>	<p><i>Decision making characteristics</i></p> <ul style="list-style-type: none"> <li>• Make decisions which are not binding unless accepted by the consumer</li> <li>• Make decisions that draw on expertise/ industry knowledge</li> <li>• Have an equitable, 'fair and reasonable', jurisdiction</li> <li>• Can draw on a wider range of remedies (such as the provision of apologies and explanations)</li> <li>• Generally cannot have their decisions appealed to a court</li> <li>• Do not have the power to set precedent</li> </ul>

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*Governance characteristics*

- Independence

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*Governance characteristics*

- Are funded by the industry
  - Can be self-regulatory, mandated self-regulatory or statutory
  - In regulated areas, are seen as part of the regulatory rather than justice system
- 

The paragraphs below provide a commentary on each of the areas shown in table 3.

*Functions.* Thomas and Frizon (2012) have argued that consumer ombudsmen in the financial services sector fulfil a number of functions in addition to individual dispute resolution. These include: dealing with consumer enquiries and providing advice; actively feeding back lessons learned from complaints to businesses and regulators; helping businesses improve their complaint handling in order to reduce and prevent disputes; and increasing financial inclusion. This last function indicates that consumer ombudsmen have a particular role in relation to reaching disadvantaged or vulnerable consumers (Brooker 2008). Interestingly, Academic 1 noted that ombudsmen remained less understood by the public than courts and that the model was not yet as well established. She considered that this had implications for ombudsmen, since complainants often had unrealistic expectations of what ombudsmen could do for them.

*Process characteristics.* A key distinguishing feature of consumer ombudsmen compared to courts is their inquisitorial rather than adversarial approach (Brooker 2008). This reflects their mission to provide an accessible form of justice and to redress the power imbalances caused by businesses' greater resources and technical knowledge (Thomas and Frizon 2012). The inquisitorial approach also means that consumer ombudsmen do not require cases to be prepared for submission by lawyers.

Although many of the claims considered by ombudsmen might otherwise have been considered under small claims court procedures, and although these procedures are undoubtedly designed to be more user friendly (and not require legal representation) than court processes used for higher value claims, it remains the case that ombudsman processes should be easier to use. Ombudsman 4 commented on this feature, noting that consumers did not have to make their own case or know how to articulate their arguments when approaching an ombudsman. She also noted that maintaining processes that were distinctive from the courts in terms of their flexibility, their informality and their inquisitorial nature was important to make sure that ombudsmen remained an accessible remedy for consumers.

A further distinguishing feature is the use by consumer ombudsmen of a suite of techniques to help consumers resolve their problems (Bondy *et al* 2014; Gill *et al* 2014). This includes techniques drawn from mediation and conciliation, and a multi-stage approach where different techniques (from informal to formal) are attempted sequentially (Office of Fair

Trading 2010). While mediation has, in many areas, being incorporated into the overall framework of the courts (e.g. through court-annexed mediation schemes), the ability of ombudsmen to use a number of flexible and differentiated internal processes is a distinguishing feature. Other important procedural features which mark out the work of consumer ombudsmen from the courts are: paper based and telephone based procedures; the near absence of oral hearings; and the private and confidential nature of the process (Merricks 2010).

*Decision making characteristics.* While consumer ombudsmen and courts begin in the same place with their decision making (by considering the law), consumer ombudsmen also apply extra-legal standards in their decision making (Morris 2008). They are empowered not only to consider the law, but also what is 'fair and reasonable' in all the circumstances of the case. This equitable jurisdiction allows consumer ombudsmen to depart from the law where this is required in order to ensure fairness in the individual case (Morris 2009). This fundamentally 'individualised' decision making is seen as an important feature of the ombudsman institution when compared to courts (Buck *et al*/2011).

Consumer ombudsmen are also able to fashion tailored and individualised remedies above and beyond those available in court in order to find fair solutions to consumer problems (Donnelly 2012); this might include providing explanations and apologies, for example. A further difference in terms of decision making is that consumer ombudsmen tend to have significant expertise in the areas upon which they adjudicate (Brooker 2008), in contrast to the generalist legal expertise of the courts. The 'consumer focus' of consumer ombudsmen compared to courts is also evident in relation to the status of decisions: these are only binding if consumers accept them and, once accepted, businesses are bound by decisions (generally with no right of appeal). This has been described by a former consumer ombudsman as a system deliberately weighted in favour of the consumer (Farrand 2001).

*Governance characteristics.* Consumer ombudsmen are funded by the industries they oversee, rather than being publicly funded. Some consumer ombudsmen are effectively a private form of dispute resolution, which distinguishes them from the state sponsored courts. A further feature is the close relationship which consumer ombudsmen have with regulators in regulated areas. This tends to involve a relationship of accountability to the regulator as well as a conception of consumer ombudsmen being part of the regulatory framework for particular consumer areas. Consumer ombudsmen may, therefore, be primarily seen as a form of dispute resolution operating under a regulatory framework of consumer protection, rather than as part of the broader justice system. This state of affairs will be given further weight since, as part of the UK government's implementation of the Consumer ADR Directive, sectoral regulators will be given the role of 'competent authority' in respect of ombudsmen operating in their sectors.

While the distinctions between courts and consumer ombudsmen are reasonably uncontroversial, the relationship between the two within the overall system of civil justice has been subject to disagreement. For many years now, commentators have highlighted that consumer ombudsmen have the potential to eclipse the courts as the primary means by which consumer complaints are resolved (James 1997). More recently, Hodges (2015) has noted consumer ombudsmen and courts are now on an equal footing to each other and that consumer ombudsmen are far more widespread as a form of dispute resolution than is generally thought. Hodges (2015, p. 606) further comments:

“...the indications are that ombudsmen in the UK have already replaced courts as providing both access to justice and delivery of justice in consumer-trader situations.”

The growing irrelevance of the courts in some areas of consumer dispute (financial services being a key example in the UK) has been welcomed by enthusiasts who see consumer ombudsmen and other forms of consumer dispute resolution as the solution to the traditional problems of cost and accessibility associated with courts. Others have, however, taken a more critical stance. Some, for example, have argued that ombudsmen are means by which consumers and citizens can be ‘pacified’ and where the interests of businesses and organisations are allowed to predominate. Wiegand (1996, p. 120) for example cites an early critic of the ombudsman institution who argued that the ombudsman was:

‘... a public pacifier, a device to assuage public critics of government operations at minimal cost without having to change anything fundamental and... a conservative and counter-revolutionary force, designed to make the existing order more palatable...’

Others have been harshly critical of what they see as the privatisation of justice through consumer dispute resolution and have argued that consumer ombudsmen are only one of several possible solutions to ensuring access to justice for consumers (Eidenmuller and Engel 2014). Indeed, Eidenmuller and Engel (2014) suggest that consumer dispute resolution mechanisms are inferior to the courts and are inappropriate for dealing with consumer disputes. The reasons for this include a perception that consumer dispute resolution involves: difficulty in fully enforcing legal rights; a lack of due process; perverse settlement incentives for businesses; high set-up costs and the need for ongoing regulation; and a restriction on the accessibility of the courts. While these debates are beyond the scope of this report, we mention them here to highlight that the differences between courts and consumer ombudsmen (sometimes simplistically reduced in popular discourse to ‘ombudsmen are good, courts are bad’) remain subject to significant debate.



## Comparison 2: consumer ombudsmen and consensual dispute resolution

Consensual dispute resolution is equated here with non-adjudicative dispute resolution and defined as a form of dispute resolution where the parties in a dispute are helped by an independent third party to reach an agreement between themselves (Blake *et al* 2013). The distinction between ombudsmen and consensual dispute resolution is more complex, since the procedural multiplicity of the ombudsman institution (the fact that it contains both adjudicative and consensual elements) is one of the features that, in our view, has made it such a difficult institution to pin down and define. Figure 2 below provides an outline of the features which are shared between consumer ombudsmen and consensual forms of dispute resolution, and those features which are unique to each institution. Table 4, which follows, provides a further breakdown of similarities and differences broken down by function, process, decision making and governance characteristics.

Figure 2: shared characteristics and distinguishing features between consumer ombudsmen and consensual dispute resolution

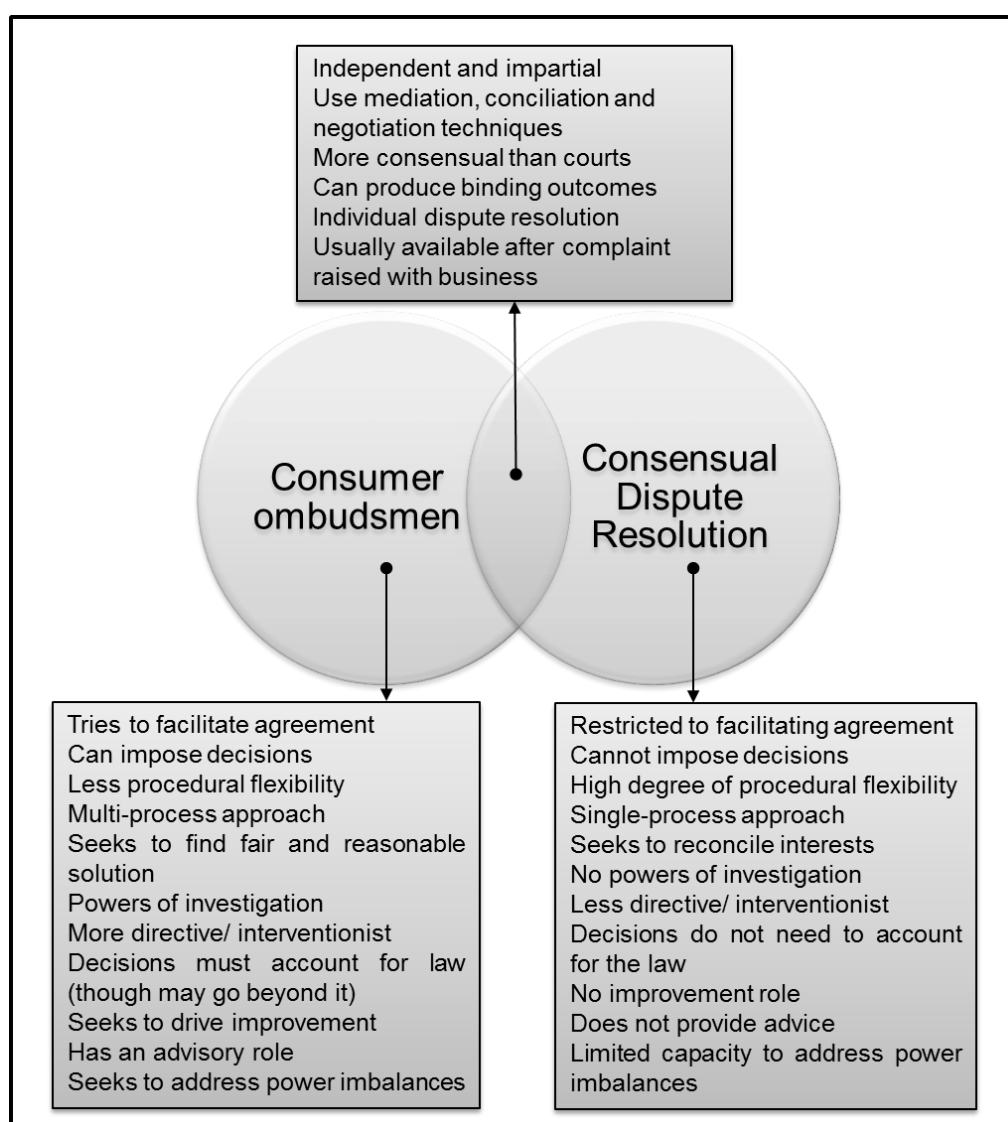


Table 4: shared characteristics between consensual dispute resolution and consumer ombudsmen broken down by functions, process, decision making and governance characteristics

<b>Shared characteristics</b>	<b>Consumer ombudsmen distinctions</b>
<i>Functions</i> <ul style="list-style-type: none"> <li>• Resolve individual disputes</li> </ul>	<i>Functions</i> <ul style="list-style-type: none"> <li>• Provide advice and support to consumers in relation to their complaint</li> <li>• Provide feedback to industry and seek to raise standards</li> <li>• Have a more explicit role in addressing power imbalances between parties</li> </ul>
<i>Process characteristics</i> <ul style="list-style-type: none"> <li>• Impartial</li> <li>• Use mediation, conciliation and/or negotiation techniques</li> <li>• More consensual than courts</li> </ul>	<i>Process characteristics</i> <ul style="list-style-type: none"> <li>• Are more directive, interventionist and evaluative in approach</li> <li>• Have less procedural flexibility</li> <li>• Employ a multi-process approach</li> <li>• Are inquisitorial, with strong powers of investigation</li> </ul>
<i>Decision making characteristics</i> <ul style="list-style-type: none"> <li>• Can produce solutions agreed by parties</li> <li>• Agreements can be binding on parties</li> </ul>	<i>Decision making characteristics</i> <ul style="list-style-type: none"> <li>• Are adjudicative bodies, empowered to impose decisions</li> <li>• Have an equitable, 'fair and reasonable', jurisdiction (which means fairness must be taken into account in reaching solutions)</li> <li>• Must take account of the law when reaching solutions</li> </ul>
<i>Governance characteristics</i> <ul style="list-style-type: none"> <li>• Independence</li> </ul>	<i>Governance characteristics</i> N/a.

There are clearly some similarities between ombudsmen and consensual forms of ADR. They are both concerned primarily with individual dispute resolution, provide an alternative to the courts and can provide binding agreements on disputes (O'Shea 2006). The paragraphs below now provide a commentary on each of the areas highlighted in table 4.

*Functions.* The distinguishing features of consumer ombudsmen in terms of their functions are very similar to those identified above in relation to the courts: consumer ombudsmen have advisory functions and seek to drive improvement, while consensual forms of dispute resolution tend not to. A further area of difference is that consumer ombudsmen seem particularly suited to dealing with areas where there are large power imbalances between parties in dispute, thanks to their strong powers of investigation and their ability to make binding decisions. This allows consumer ombudsmen to redress individual power imbalances. Consensual approaches have traditionally been criticised for their lack of ability

to do this, albeit some forms, such as rights-based mediation, claim to do this (Roberts and Palmer 2005).

*Process characteristics.* Modern ombudsmen (in both public and private sectors) have bolstered the traditional tools of investigation, reporting and recommendation with a range of 'informal resolution' techniques aimed at the swift resolution of complaints (Bondy *et al* 2014). These techniques include the use of negotiation, brokering, mediation and conciliation. Recent research mapping the use of informal resolution approaches by ombudsmen in the UK and Ireland (Bondy *et al* 2014) found considerable variety in approaches and, more particularly, considerable confusion about what processes were being used, how they were being used and why they were being used.

Nonetheless, the use of these consensual dispute resolution techniques is now firmly seen as part of the 'modern purpose' of the ombudsman institution and is a feature that has been particularly associated with consumer ombudsmen such as the Financial Ombudsman Service (Morris and James 2002). This is echoed by Gilad's (2008) argument, reviewed above, that ombudsman schemes perform a therapeutic function in respect of complaints, which attempt to help reconcile consumers with reality and help them gain better insights into their problems. This implies a more consensual approach than the straightforward provision of a decision. Creutzfeldt (2014), in a recent study concerning Ombudsman Services, also noted a shift away from formal procedures towards informal resolution, driven by high caseloads and consumer demand for quicker and simpler processes.

While the trend towards using consensual dispute resolution as part of ombudsman processes seems clear, what is less clear is the exact form which these processes are taking. Gregory (2002) has suggested that mediation and negotiation have a role to play in ombudsman processes but only in relation to proposed remedies rather than the substantive decisions on cases.

It is perhaps no surprise then that ombudsmen are discussed under the heading "hybrid processes" and "processual experimentation" in several dispute resolution textbooks (Macfarlane 2010; Roberts and Palmer 2005). Ombudsmen borrow some of the techniques of consensual dispute resolution, but remain very much decision makers, with the power to find and determine the facts of a complaint. This hybrid position has been perfectly described by Abraham (2008, p.2) who has commented that:

"...the ombudsman system, although different, is complementary to the courts and tribunals on the one hand and to negotiated forms of alternative dispute resolution on the other; different from, yet receptive to elements of, both."

The ombudsman institution is, therefore, seen as incorporating elements of consensual dispute resolution as part of its tool box of dispute resolution processes. While the hybrid nature of consumer ombudsmen and their use of consensual approaches is clear, it remains

the case that they have strong powers of investigation which distinguish them in terms of process from these consensual forms.

*Decision making characteristics.* A key defining characteristic of consumer ombudsmen, compared with consensual dispute resolution, is that the former are ultimately evaluative bodies, even when seeking to perform a facilitative or consensual role. Gill *et al* (2014) and O'Shea (2006), for example, have suggested that, in practice, the informal approaches used by ombudsmen are likely to be highly directive and, while they may not provide a formal decision, they may stop only just short of that. Indeed, it is widely accepted that – albeit ombudsmen may attempt consensual resolutions as part of their overall processes – they are ultimately adjudicative bodies and have a central role in determining the rights and wrongs of disputes. As O'Shea (2006) argues:

“Despite the use of non-determinative processes, they [ombudsmen] are not merely a third party mediator or conciliator. Their investigation role (traditional for ombudsmen) is primarily directed towards informing a decision about the dispute. Its effect of better informing the parties, and thus encouraging settlement, is secondary.” (O'Shea 2006, p. 71)

Indeed, Reif (2004, p. 16) has noted that “it should be understood that the ombudsman has a broader mandate and stronger powers than those of simple ADR providers.” The ability to provide binding adjudications, therefore, is a key distinctive feature of consumer ombudsmen. It follows from this also that consumer ombudsmen's decisions are shaped by normative standards and principles (e.g. the law or the 'fair and reasonable' decision making standard). This again is distinct from consensual approaches that mainly seek to find solutions that are acceptable from the subjective perspective of the parties rather than from the objective perspective of, for example, the law.

*Governance characteristics.* Given that consensual dispute resolution represents a set of processes rather than an institution, we are limited to commenting here on independence as a shared feature of consensual dispute resolution and consumer ombudsmen.

### Comparison 3: consumer ombudsmen and other forms of consumer dispute resolution

Over the past 20 years, the European Commission's work on consumer dispute resolution (CDR) has gradually traced a clear outline of the consumer dispute resolution field. It has done so by providing definitions which have been purposely broad and which have succeeded in recognising the diversity of practice across Europe at the same time as identifying core common principles. There has been less clarity, however, about the distinctions between the various forms of dispute resolution that fall within the CDR umbrella: arbitration schemes, complaint boards, tribunals, adjudication schemes, conciliation schemes, complaint departments within regulatory agencies, and consumer ombudsmen (Hodges *et al* 2012; Thomas and Frizon 2012). As Creutzfeldt (2014) has commented: "CDR includes a variety of techniques, though no shared classification exists among the various CDR schemes". Our view, illustrated in figure 3 below, is that while consumer ombudsmen and other forms of CDR share a common platform, consumer ombudsmen are distinctive and demonstrate a number of 'added value' features when compared to other forms of CDR. In order to make our comparison manageable and since our concern in this report is with consumer ombudsmen in the UK, our comparison is largely restricted to considering the forms of CDR that are most prevalent in this country, such as arbitration boards adjudication schemes, and conciliation schemes.

Figure 3: shared characteristics and distinguishing features between consumer ombudsmen and other forms of consumer dispute resolution

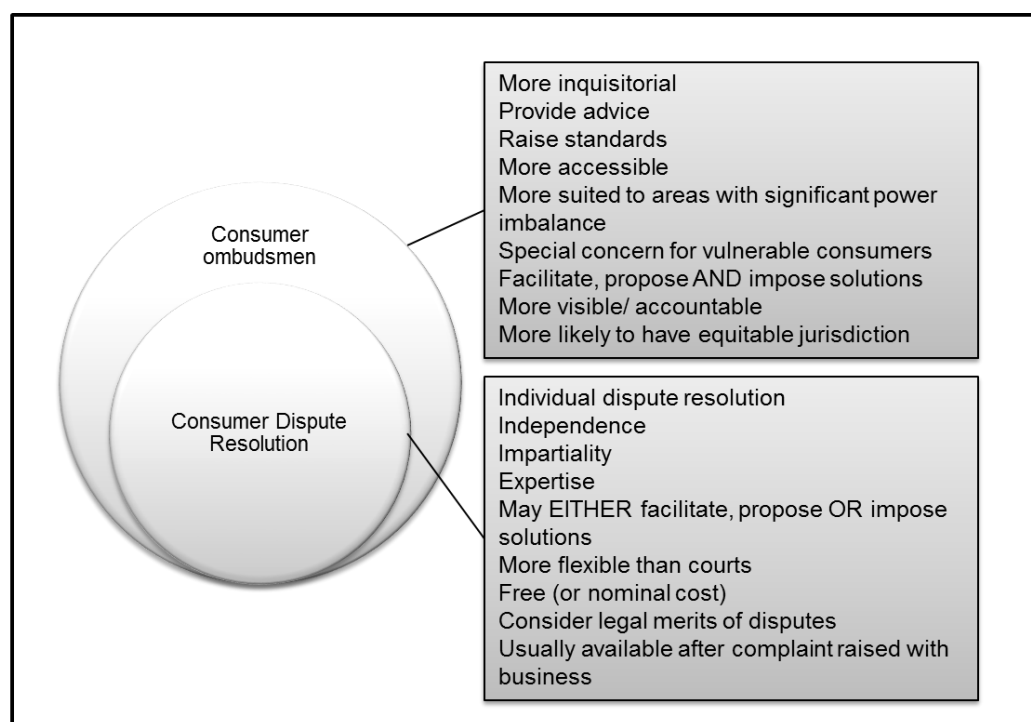


Table 5 over the page provides a break down of the similarities and differences shown in figure 3 by function, process, decision making and governance characteristics.

Table 5: shared characteristics between other forms of consumer dispute resolution and consumer ombudsmen broken down by functions, process, decision making and governance characteristics

<b>Shared characteristics</b>	<b>Consumer ombudsmen distinctions</b>
<p><i>Functions</i></p> <ul style="list-style-type: none"> <li>• Resolve individual disputes</li> </ul>	<p><i>Functions</i></p> <ul style="list-style-type: none"> <li>• Provide advice and support to consumers in relation to their complaint</li> <li>• Provide feedback to industry and seek to raise standards</li> <li>• Have a more explicit role in addressing power imbalances between parties</li> <li>• Have a special concern for vulnerable consumers</li> </ul>
<p><i>Process characteristics</i></p> <ul style="list-style-type: none"> <li>• Impartiality</li> <li>• More flexible, quicker, cheaper than courts</li> <li>• May either facilitate, propose or impose a solution</li> <li>• Free to consumer (or nominal cost)</li> </ul>	<p><i>Process characteristics</i></p> <ul style="list-style-type: none"> <li>• Are more inquisitorial and have strong powers of investigation</li> <li>• Employ a multi-process approach</li> <li>• Are more accessible, as a result of their advisory functions and inquisitorial approach</li> </ul>
<p><i>Decision making characteristics</i></p> <ul style="list-style-type: none"> <li>• Expertise</li> <li>• Consider the legal merits of cases</li> </ul>	<p><i>Decision making characteristics</i></p> <ul style="list-style-type: none"> <li>• Unlike some consumer dispute resolution mechanisms (which can only facilitate or propose solutions) consumer ombudsmen make binding decisions</li> <li>• More likely to have equitable jurisdiction, rather than being limited to strict legality</li> </ul>
<p><i>Governance characteristics</i></p> <ul style="list-style-type: none"> <li>• Independence</li> <li>• Paid for by industry</li> </ul>	<p><i>Governance characteristics</i></p> <ul style="list-style-type: none"> <li>• Are more visible and accountable as a result of the figure of the ombudsman</li> </ul>

The paragraphs below provide a commentary on the key areas highlighted in table 5.

*Functions.* We follow Hodges (2015) in highlighting two key ways in which consumer ombudsmen differ from CDR:

- The provision of advice to consumers
- The collection and feedback of data on complaints to businesses and regulators

Hodges (2015, p.597) argues that these features are “generally only found in ombudsman schemes” and are not features of other forms of CDR. International Ombudsman 2 also highlighted these two features as unique to ombudsmen, and she laid particular emphasis on the advisory function of ombudsmen being designed to assist vulnerable consumers. She noted that ombudsmen had a special mission to assist these consumers and that this could

even, in some cases, lead to them exceeding their terms of reference when trying to address injustices affecting this group. The Legal Services Consumer Panel has also argued that consumer ombudsmen have distinctive features. They agree with Hodges and International Ombudsman 2 with regard to the distinctiveness of consumer ombudsmen's advice provision and standard raising work, but also emphasise that ombudsmen are particularly well suited to situations where there are significant power imbalances between the parties and where there may be significant levels of consumer vulnerability (LSCP 2013).

*Process characteristics.* Hodges *et al* (2012) follow the European Commission in providing a definition of CDR that follows a 'functional' approach i.e. that concentrates on the functions performed by particular CDR mechanisms, rather than the detailed set-up and operation of their procedures. Using this functional approach, which is the one adopted in the *Directive on Consumer ADR*, CDR is seen as being composed of three broad types of mechanism: those that facilitate agreements between the parties; those that propose decisions to the parties; and those that impose decisions on the parties. Although these characteristics have been described as 'functions' we prefer to see them as processes, since they do not describe fundamental functions of mechanisms but rather highlight the processes through which a fundamental function (dispute resolution) is fulfilled.

The first thing that we might note is that ombudsmen, unlike many other CDR bodies, tend to draw on each of the three processes highlighted in the Directive's functional definition. Indeed, consumer ombudsmen processes often begin with facilitative approaches and proceed through to proposed decisions, before decisions are imposed as a last resort. Consumer ombudsmen's inquisitorial approach is also a distinctive feature compared with other more adversarial forms of CDR, such as arbitration, allowing ombudsmen to empower consumers and assist the vulnerable.

Academic 2 emphasised this point and argued that ombudsmen would do a lot of the 'donkey work' for the consumer in terms of framing issues and requesting documents and that this would not generally be done by adjudication or arbitration schemes. However, the Legal Services Consumer Panel (2013) have noted that consumer ombudsmen tended to be more expensive for those complained about and that the 'added value' they provided came at a cost; they, therefore, suggested that consumer ombudsmen may not be the most appropriate model in all sectors.

*Decision making characteristics.* A key difference with some forms of consumer dispute resolution which only seek to facilitate agreements (such as conciliation schemes), is that consumer ombudsmen are able to impose decisions (albeit this feature is shared with adjudication and arbitration schemes). A further difference relates to the decision making standard employed by consumer ombudsmen. The fair and reasonable standard and the provision of an equitable jurisdiction was seen as being distinct from other mechanisms, which were more likely to be restricted to the strict letter of the law in their decision making.

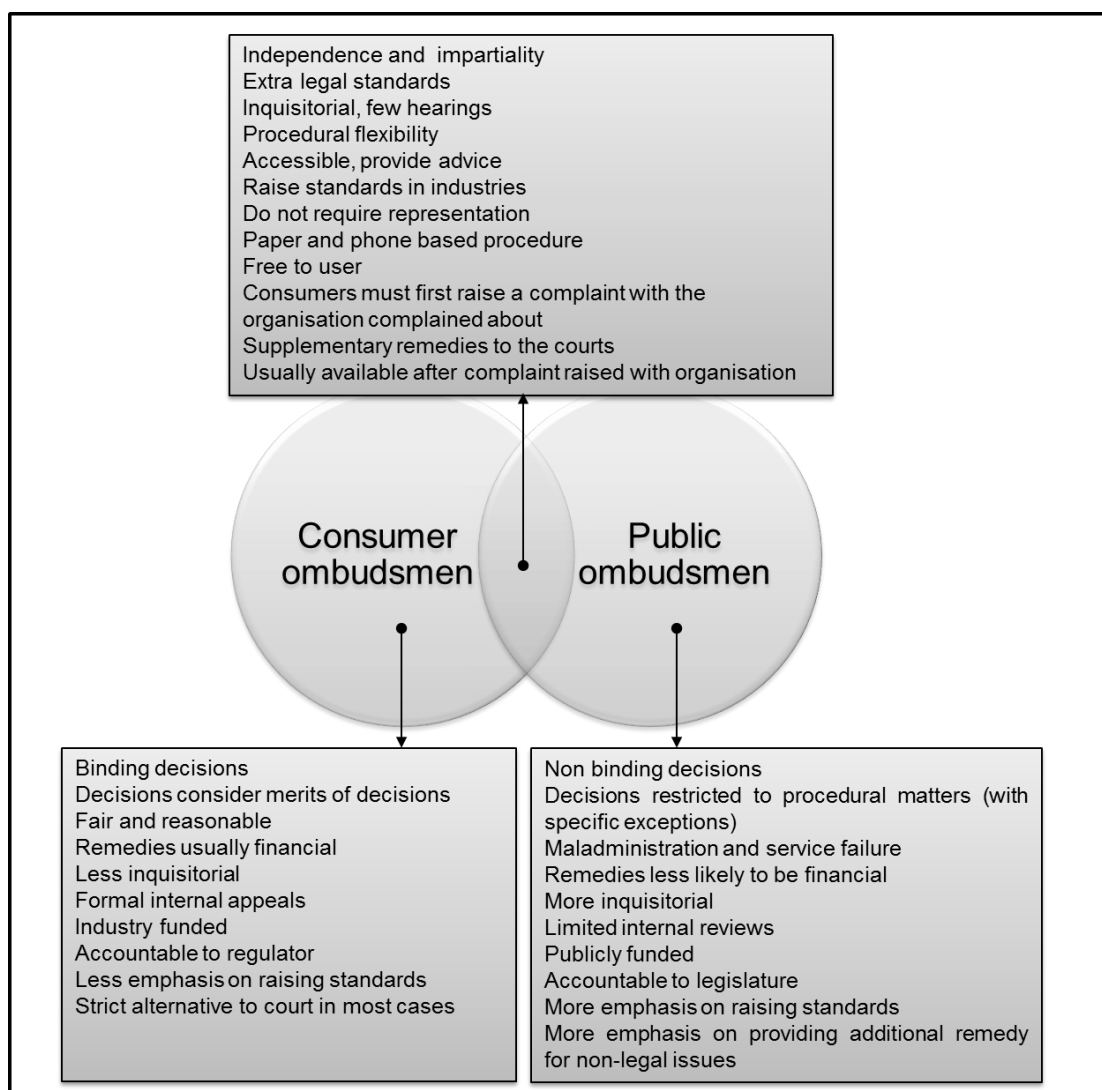
*Governance characteristics.* Academic 2 considered that consumer ombudsmen had greater visibility and accountability than other consumer dispute resolution bodies, as a result of having an organisation led by a named ombudsman who acted as a figurehead.



#### Comparison 4: consumer ombudsmen and public ombudsmen

As noted above, much discussion has been generated in the academic literature, and amongst practitioners, with regard to the development of ombudsmen in the private sector. While this debate has occasionally been intemperate, we take the view shared by a number of commentators that properly constituted consumer ombudsmen are as legitimate and valuable a form of dispute resolution as their public counterparts (Buck et al 2011; James 1997; Reif 2004; Stuhmcke 1998). In distinguishing between the two (as indeed is the case with all our distinctions) we do not suggest that one is 'better' or 'worse' than the other. Simply, we highlight their similarities and differences with a view to obtaining a clearer picture of the unique features of consumer ombudsmen. Figure 4 below provides an outline of the features which are shared between consumer ombudsmen and public ombudsmen and those features which are unique to each institution.

Figure 4: shared characteristics and distinguishing features between consumer ombudsmen and public ombudsmen



As will be clear from figure 4, consumer ombudsmen and public ombudsmen share a great deal. This view is endorsed by Stumhcke (1998, p. 831), who has noted that:

"In essence an industry ombudsman pursues many of the same objectives as their public law counterpart and is subject to many of the same advantages and criticisms"

In this respect, the first thing we should note is that the distinction between consumer and public ombudsmen is not an absolute one. In some jurisdictions (such as Catalonia) a public ombudsman is responsible for dealing with certain consumer disputes (Catalan Ombudsman 2015). As noted in their 2014 report, "the growing trend toward the indirect provision by private economic operators of numerous public services, or those traditionally considered of general interest, means that the ombudsman's realm of supervision no longer falls exclusively to public administrations" (Catalan Ombudsman 2014)

Closer to home, the Scottish Public Services Ombudsman has a jurisdiction over housing associations and universities, neither of which are government bodies in the classic sense (SPSO 2014). Similarly, the Local Government Ombudsman in England has a jurisdiction over private care homes (LGO 2014). Ombudsman 2 also pointed out that, in common with other ombudsmen, she had jurisdiction over private bodies delivering publicly funded services. The increasingly blurred line between the public and private sector is, therefore, reflected to some extent in the jurisdictions of ombudsmen. This was reflected by Academic 2 who noted that the division between public and private schemes was not a neat one and would be better represented as occurring along a spectrum. International Ombudsman 2 pointed out that in Europe, some consumer ombudsmen had features much closer to those of the public ombudsmen (for example, in some jurisdictions consumer ombudsmen did not make binding decisions).

In addition, we have already noted above that ombudsmen which have private sector jurisdictions but which are public bodies set up by statute have been categorised as "hybrid". Given their status as public bodies and the constitutional role they play as alternatives to the court, strong arguments have been made in the literature for them to be considered as public law bodies and as part of the administrative justice system (James 1997; Merricks 2010; Oliver 2010). Indeed, Merricks (2010) has been keen to stress the similarities between consumer ombudsmen and public ombudsmen, pointing out that both: use hearings very infrequently, use a multi-stage and flexible process, are inquisitorial rather than adversarial, and feed back lessons to the bodies they investigate. Rowat (2003, p. 46), a fierce critic of the way in which organisational ombudsmen have developed in the United States, sees the development of consumer ombudsmen much more positively; he notes: "The creation of industry wide ombudsmen is interesting because of their great similarity to the classical governmental ombudsman."

Others have also stressed the similarities between consumer ombudsmen and public ombudsmen, in particular noting the increasing influence which the values and approaches underlying the consumer ombudsman model can be seen to have. O'Brien (2015), for instance, is fighting a rear-guard battle to defend fundamental social democratic principles as the legitimating basis for public ombudsmen, in the face of attack from consumerism and market efficiency, which he identifies as the principles underpinning the consumer ombudsman model. Whatever one's view of O'Brien's critique, it provides some evidence for the increasing convergence between the approaches of public and consumer ombudsmen.

Interviewees were split in terms of the extent to which they emphasised similarities or differences between public and consumer ombudsmen. Ombudsman 3 and International Ombudsman 1 stressed the similarities between the institutions, as long as they were properly constituted and independent. Indeed, Ombudsman 3 considered that some of the differences were not a function of whether schemes were private or public, but rather had emerged as a result of different needs in different sectors. Ombudsman 1 and Ombudsman 2, on the other hand, placed greater emphasis on the distinctive features and approaches of consumer ombudsmen.

Indeed, for all the commonality between the institutions, there are some important differences between the models. As with our analysis above, we look at these points further in relation four areas: functions; process characteristics; decision making characteristics; and governance characteristics. Table 6 below provides a summary.

Table 6: shared characteristics between public ombudsmen and consumer ombudsmen broken down by functions, process, decision making and governance characteristics

Shared characteristics	Consumer ombudsmen distinctions
<p><i>Functions</i></p> <ul style="list-style-type: none"> <li>• Resolve individual disputes</li> <li>• Accessible, provide advice</li> <li>• Raise standards in industries</li> </ul>	<p><i>Functions</i></p> <ul style="list-style-type: none"> <li>• Have less emphasis on raising standards</li> <li>• Come closer to being a strict alternative to courts, as a result of their ability to consider the legal merits of actions and their power to take binding decisions</li> </ul>
<p><i>Process characteristics</i></p> <ul style="list-style-type: none"> <li>• Impartiality</li> <li>• Inquisitorial, few hearings</li> <li>• Procedural flexibility</li> <li>• Do not require representation</li> <li>• Paper and phone based procedure</li> <li>• Free to user</li> <li>• Usually available after complaint raised with organisation</li> </ul>	<p><i>Process characteristics</i></p> <ul style="list-style-type: none"> <li>• Are less inquisitorial</li> <li>• Often feature formal internal appeals</li> </ul>

<i>Decision making characteristics</i> <ul style="list-style-type: none"> <li>• Use extra legal standards</li> <li>• Supplementary remedies to the courts</li> </ul>	<i>Decision making characteristics</i> <ul style="list-style-type: none"> <li>• Make binding decisions</li> <li>• Consider and determine the merits of decisions/ actions</li> <li>• Use the fair and reasonable standard, rather than maladministration or service failure</li> <li>• Usually provide remedies that involve a financial element</li> </ul>
<i>Governance characteristics</i> <ul style="list-style-type: none"> <li>• Independence</li> </ul>	<i>Governance characteristics</i> <ul style="list-style-type: none"> <li>• Are industry funded</li> <li>• Are primarily accountable to regulators and/or self-regulatory mechanisms</li> <li>• May operate in a framework that allows competition with other ombudsmen</li> <li>• Tend to have some form of governing body or formal board</li> </ul>

The paragraphs below provide a commentary on the features identified in table 6.

*Functions.* The major functional difference between consumer ombudsmen and public ombudsmen is an obvious one: the former have jurisdiction over private sector bodies, while the latter mainly have jurisdiction over public sector bodies (subject to the caveat already noted above). There are also some differences in emphasis between consumer ombudsmen and public ombudsmen. The latter, for example, tend to be more associated with ‘fire-watching’ approaches (Harlow and Rawlings 2009) and tasks associated with generating systemic improvements. Academic 1 concurred with this point, although she noted that there was not yet much evidence that public ombudsmen were particularly effective in this regard. Ombudsman 1 highlighted what she saw as an ideological distinction in terms of the systemic function performed by public and consumer ombudsmen: she questioned what ‘added value’ meant in a commercial context and whether consumer ombudsmen might be suborned to the task of improving bottom lines rather than improving customer experience.

A further functional distinction between consumer ombudsmen and public ombudsmen relates to their respective relationships with the courts. Consumer ombudsmen – because they consider the merits of decisions, consider the lawfulness of those decisions and make binding awards – provide a strict alternative to the courts (Morris and James 2002). This is in addition to providing an additional remedy through the exercise of the extra-legal ‘fair and reasonable’ standard. Public ombudsmen, on the other hand, were designed largely to provide protections for citizens that are additional to those available through the courts:

“In the public sector, ombudsmen are concerned with issues about the administration, where there is no legal remedy when things go wrong. In the private

sector, ombudsmen are not confined to issues of maladministration, and they frequently deal with issues of a contractual nature. In this sense, they do represent a genuinely alternative dispute resolution mechanism to the courts" (Seneviratne 2002, p. 12).

*Process characteristics.* Since there is significant variety in the procedural approaches deployed both within and between consumer ombudsmen and public ombudsmen, it is hard to make definitive statements about the distinctions between them. Indeed, this is to some extent an empirical question, which requires further research along the lines of that recently conducted by Bondy *et al* (2014). Nonetheless, we can give some indication of tendencies that appear to be connected more closely with one model than the other. For instance, consumer ombudsmen tend to have a clearer process of internal appeal, where cases are initially dealt with by a more junior officer but may be 'appealed' to an ombudsman if there is disagreement (this is the process, for example, currently followed by the Financial Ombudsman Services, the Legal Ombudsman and Ombudsman Services). While public ombudsmen operate internal review processes, there is not generally the same two stage process involving an automatic right for a final decision from an ombudsman.

A further distinction in approach relates to the degree to which consumer ombudsmen and public ombudsmen are inquisitorial. While both investigate complaints, public ombudsmen have been seen as more robust in their approach to investigation. Hodges *et al* (2012, p. 401) have noted that:

"The investigative procedure [of ombudsmen] is traditionally an inquisitorial mode of operation, but CADR examples [of ombudsmen] now increasingly involve merely considering the evidence put before them by the two parties".

A similar point was raised by several of our interviewees, who felt that public ombudsmen tended to go into matters in greater detail. Academic 2 said his perception was that, while this was the case, public ombudsmen tended to have less flexibility in terms of their processes; she referred to the longer throughput times associated with public ombudsmen as an example of this. Ombudsman 1 noted the vast scale of some consumer ombudsmen and (echoing Morris 2008) questioned the extent to which a focus on the individual could be maintained in that context. She also questioned whether the drivers around speed of decision making in the private sector (with faster turn around times expected) meant that there was less depth in investigation and also less of an expectation that decisions had to stand up to public scrutiny.

Ombudsmen 2 referred to the fact that consumer ombudsmen tended to have multiple ombudsmen, rather than a single ombudsman. She considered that this was necessary because of the size of schemes, but that it changed their approach and led to a greater reliance on delegation and quality assurance processes.

*Decision making characteristics.* The major difference here relates to the fact that consumer ombudsmen make binding decisions (usually only if accepted by the consumer), whereas public ombudsmen do not. Several commentators have noted that, in some ways, this brings the consumer ombudsman model closer to arbitration than the classic public ombudsmen (Rowat 2003; Seneviratne 2002). In addition, consumer ombudsmen have significantly broader decision making authority than public ombudsmen, since they are able to consider the legal merits of decisions. These features are highlighted by James and Morris (2002) as key innovations that occurred when the ombudsman idea was imported into the private sector.

A further distinction in decision making approaches has been suggested by Merricks (2010) who, referring to decision making by the Financial Ombudsman Service, noted that consumer ombudsmen were more concerned with outcomes than processes. He suggested that whereas public law traditionally concerned itself with the quality of decision making processes, the private law tradition of the Financial Ombudsman Service led to a greater emphasis on the outcomes of decisions and how unfair outcomes could be remedied.

Finally, the nature of the decision making standards deployed by consumer and public ombudsmen are also clearly different: public ombudsmen are concerned mainly with maladministration and/or service failure, whereas consumer ombudsmen apply the fair and reasonable standard. The latter allows consumer ombudsmen to go significantly further than maladministration in seeking equitable solutions to complaints (Blake *et al* 2013; James 1997).

*Governance arrangements.* Public ombudsmen are publicly funded, whereas consumer ombudsmen are normally funded by the industries they investigate through a case fee and/or levy system. A further distinction here relates to mechanisms of appointment and accountability, with public ombudsmen tending to have a relationship with the legislature, whereas consumer ombudsmen tend to have a primary accountability relationship to the sectoral regulator for their area of jurisdiction. This was seen as an important point by Ombudsman 1, who commented that consumer ombudsmen could be put in a difficult position with regard to their relationship with regulators. She expressed a concern that regulators could exert undue influence over consumer ombudsmen and that this was a pressure from which public ombudsmen were free. This view was echoed by Ombudsman 2.

## **5. Consumer ombudsmen within the consumer protection landscape**

In this section, the report considers the overlap between roles performed by consumer ombudsmen and those performed by other parts of the consumer protection landscape.

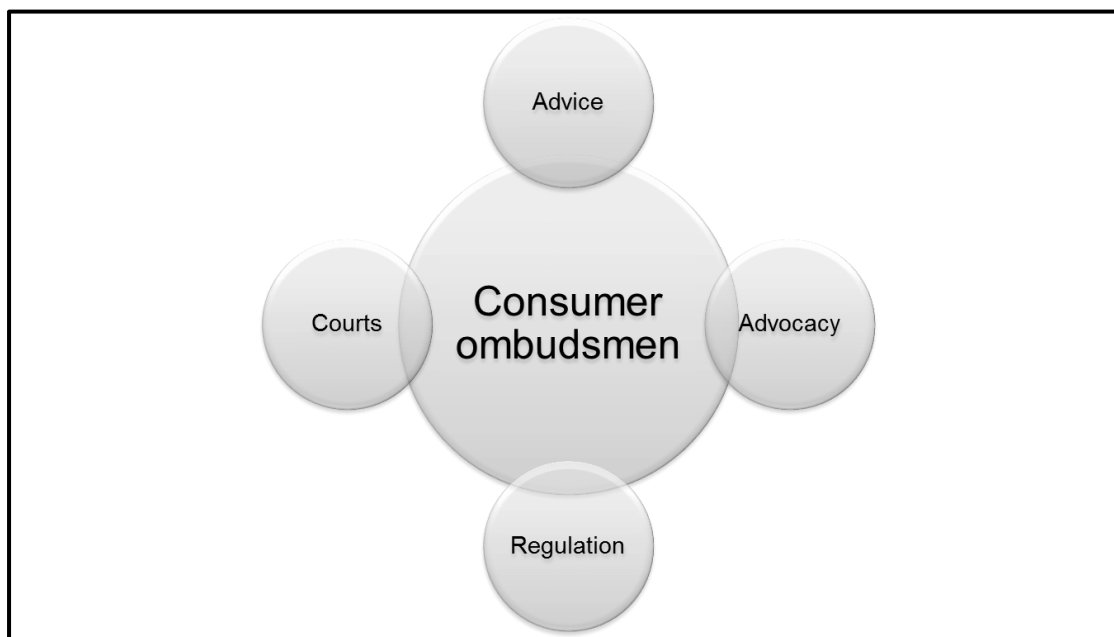
The distinction between consumer ombudsmen – bodies that primarily fulfil an individual dispute resolution function – and other aspects of the consumer protection landscape (such as advisers, advocates and regulators) should be clearer than that between consumer ombudsman and other forms of dispute resolution. Indeed, the distinctions in this area can be made simply by reference to the primary functions of each of these actors: consumer ombudsmen resolve individual disputes, advisers provide consumer and/or legal advice, advocates provide consumer and/or legal representation, and regulators regulate.

However, several of the features of consumer ombudsmen which we have identified in the previous section of this report are shared or, at the very least, which echo those carried out by other aspects of the consumer protection system. Hodges (2015, p. 599) sees this as an opportunity for consumer ombudsmen and envisages a situation where the multi-functional ombudsman is able to provide an efficient alternative to other aspects of consumer protection:

“In analytical terms, ombudsmen can, therefore, be viewed as something of a hybrid between consumer advice bodies (or lawyers), courts and regulators, since they can deliver all three functions if designed appropriately. This has the potential to save considerable cost compared with arrangements where each of these three functions are delivered by different providers”.

Figure 5 provides an illustration of the territory occupied by consumer ombudsmen and the hybrid aspects of their role in the consumer protection landscape.

Figure 5: the 'domain' of consumer ombudsmen in the consumer protection landscape



The extent to which consumer ombudsmen replicate functions performed by other aspects of the consumer protection can be described as follows:

- courts: as we saw above, consumer ombudsmen represent a strict alternative to the individual dispute resolution traditionally provided by courts and, in the UK, have effectively already eclipsed the courts as the primary form of consumer dispute resolution in sectors such as financial services.
- consumer and legal advice: ombudsmen advise consumers on how to complain to organisations under their jurisdiction and seek to 'manage expectations' (Gilad 2008) with regard to the likely outcomes of their cases – such activities are similar to those performed by consumer advisers or lawyers in helping consumers assess their options, their routes to redress and their chances of success.
- consumer and legal advocacy: although ombudsmen are explicitly not consumer advocates or consumer champions, their inquisitorial functions and the fact that they assist consumers in framing their complaints, can be seen as echoing the function of the consumer advocate or lawyer in allowing a consumer's best case to be put forward.
- regulation: consumer ombudsmen, in the exercise of their fair and reasonable jurisdiction and through repeated decisions, inevitably perform a quasi-regulatory role (Morris 2008) by providing industry with messages about expected standards and conduct. In addition, ombudsmen are able to collect and aggregate data on complaint trends that can allow businesses and regulators to develop insights into the operation of the market in question. Ombudsman 4 noted that while ombudsmen



had a role in helping make markets fairer and in assisting regulators, they did not regulate or lay down rules in the same way. Academic 2 concurred and noted that the role of regulators was to lay down minimum standards for compliance through their rule making activities, while the role of ombudsmen was to go beyond this and promote ideas around fair treatment of the individual (which could not be easily captured in regulatory approaches). It is notable that not all areas of consumer-business transactions feature a specific sectoral regulator. Presumably there would be more scope for consumer ombudsmen to fulfil quasi-regulatory and norm setting functions in those areas.

Gilad (2008) has written about the 'domain perception' of the Financial Ombudsman Service (FOS) and the 'struggle for accepted domain' faced by ombudsmen. Her focus was on the relationship between the FOS and the courts, and between the FOS and the regulator. Overall, her findings draw attention to the fact that ombudsmen are likely to be constrained and influenced by the institutional settings in which they operate and the goals and territory occupied by other powerful institutions within this landscape.

The idea of 'domain perception' is clearly a useful one in terms of situating consumer ombudsmen within the broader consumer protection landscape: it calls attention to the limits and influences on the domain which ombudsmen can legitimately carve out for themselves. This point was echoed by the International CDR Body Manager who noted that in European countries where courts and regulators were perceived as more effective, there had been less room for the development of ombudsmen in general and, in particular, ombudsmen fulfilling quasi-regulatory functions. She referred to being told by a UK ombudsman that "the success of the ombudsman in the UK is the result of a failure by the regulators".

This graphically illustrates how the context in which ombudsmen operate may affect their functions and approaches. This view was also given some support by Academic 1 who commented that ombudsmen in Australia had been pushed to take on more regulatory functions as a result of the perceived inadequacy of regulatory organisations there. International Ombudsman 2 said that ombudsmen had a particular role in ensuring that markets were fair to consumers; she commented that there was a strong risk that regulators could become 'captured' given that they tended to interact mostly with industry. Consumer ombudsmen on the other hand, continuously heard from both consumers and industry, allowing them to ensure a balanced view and to safeguard the consumer interest.

Some scholars, such as Hodges (2015), are enthusiastic about the possibility of ombudsmen fulfilling expanded roles within the consumer protection landscape. However, While a certain amount of overlap in functions between various aspects of the consumer protection system has the potential to act in favour of consumer interests, we cannot envisage a situation whereby ombudsmen would supplant advice, advocacy and regulation. While ombudsmen

may beneficially infringe on these territories, we suggest that their activities in these areas must be limited and subsidiary to the core function of individual dispute resolution. While there may be efficiency arguments for multi-functional ombudsmen with expanded advice, advocacy and regulatory functions, in our view, for these functions to operate optimally they must be independent from dispute resolution mechanisms.

As noted in the introduction, Lon Fuller (1971, 1978) famously set out to describe the functions, forms and limits of adjudication and mediation as distinctive dispute processes. Our aim in this report has been to discover the functions, forms and limits of consumer ombudsmen. The distinction we seek to draw here between consumer ombudsmen and aspects of the consumer protection landscape refers particularly to the limits and outer boundaries of the institution. Essentially our question here is: how far can the features of the ombudsman that make it a distinctive institution in the consumer dispute resolution landscape (in particular its advisory, inquisitorial and improvement roles) be extended? Hodges (2015) seems to consider that there is room for significant expansion of consumer ombudsmen's 'added value' functionality. We are more cautious and believe that these 'added value' features should remain in place, but remain limited.

## **6. Conclusions: functions, forms and limits**

The task of defining consumer ombudsmen is not an easy one. It is a fundamentally hybrid institution, sharing a number of features with other forms of dispute resolution and other parts of the consumer protection landscape. It is precisely this hybrid nature and its ability to perform multiple functions in multiple ways that have made the institution so successful. At the same time, this flexibility and the institution's concomitant success have come at the cost of clarity. Experts may know an ombudsman when they see one, but explaining this model of dispute resolution to citizens, consumers and policymakers is more difficult.

There is a significant question over whether this matters. If dispute resolution schemes are independent and operate to the highest standards in relation to fairness, accountability and so on, does it matter whether they are ombudsmen or whether they are arbitration schemes or adjudication schemes? At one level, it does not. It is more important that effective redress should be available to consumers and citizens than that we should have clear labels for each mechanism. At the same time, there does not seem to be any suggestion, either in the literature or amongst our interviewees, that all forms of consumer dispute resolution or independent complaint handling are the same. Indeed, we must presume that there are distinctions between dispute resolution mechanisms and that those distinctions imply a set of relative advantages and disadvantages for each mechanism.

If it is right that there are distinctions to be made between ombudsmen and other forms of dispute resolution, and that those distinctions lay the ground for certain advantages and disadvantages, then understanding the distinctive features of each mechanism becomes an important question for all those interested in designing effective systems of dispute resolution. If ombudsmen, arbitration schemes or adjudication schemes are particularly suited to certain functions and tasks (such as improving services, or redressing the strengths of arms), or demonstrate distinct features (such as quick, efficient processes) then we should be clear in identifying these and understanding which mechanisms will be suitable in which contexts.

As we have seen, Lon Fuller's (1971, 1978) concept of 'process pluralism' is the idea that every method of dispute resolution has certain functions, forms and limits and that these determine the particular 'zone of competence' within which that method of dispute resolution will be most effective (Cheng 2012). This report has been concerned with identifying the functions, forms and limits of consumer ombudsmen and we follow Fuller in arguing that different methods of dispute processing have particular characteristics which make them more or less suitable depending on a range of factors (such as the nature of the disputes, the goals of the parties, etc.). In each of the sections above, we have sought to show the shared territory and distinctions between consumer ombudsmen and other, similar forms of dispute resolution. We have also sought to highlight the place of consumer ombudsmen in the consumer protection landscape. Having done so, what can we conclude?

One conclusion is that consumer ombudsmen and public ombudsmen share a great deal. While there are slight differences in emphasis in terms of their functions, the main differences relate to the forms that consumer ombudsmen have taken (particularly in terms of their ability to make binding decisions) and the fact that they tend to be associated with regulatory systems. While these distinction exist, they are clearly not as significant as those that exist in relation to the other comparisons in this report. Indeed, particularly when operating in areas where there is a strong public interest, it is perhaps better to see consumer and public ombudsmen as two sides of the same coin, rather than as entirely distinct forms of dispute resolution.

Annex 5 provides a summary of the shared characteristics and distinguishing features of consumer ombudsmen in each of our comparisons. We have used this summary as the basis for developing our overall conclusions about the functions, forms and limits of consumer ombudsmen. Given that our purpose in concluding is to provide an overall description of consumer ombudsmen (rather than to find the characteristics that distinguish them within the field of dispute resolution), our method of analysis has been to draw together all the shared and distinguishing features of consumer ombudsmen identified in the report. As a result, we suggest the following description of consumer ombudsmen:

### ***Functions***

The functions of consumer ombudsmen are:

- To provide independent resolution of disputes arising from contracts and transactions between consumers and private businesses
- To provide a strict alternative to the use of the courts and, additionally, to provide an equitable jurisdiction to provide additional consumer protection
- To provide advice and assistance to consumers in relation to their disputes, reducing the need for representation
- To equalise the balance of power between parties and identify, and provide special assistance to, the most vulnerable consumers to facilitate their access to redress
- To help consumers whose complaints are not valid understand why that is the case and help them move on from their dispute
- To raise standards amongst bodies subject to investigation by feeding back lessons that arise in decisions
- To enhance consumer confidence and trust in the sectors subject to investigation

## ***Forms***

The principal forms of consumer ombudsmen include:

### *Process characteristics*

- An impartial and fair process of dispute resolution, usually only available after a complaint has been made directly to a business
- A flexible, multi-process approach drawing on consensual and adjudicative forms of dispute resolution
- An inquisitorial fact finding and evaluative process (largely in writing or by telephone) with rare use of oral hearings
- A confidential investigation process which takes place in private (although outcomes may be published in anonymised or semi-anonymised form)
- An accessible and free process for consumers, with no requirement for them to be represented by legal advisers

### *Decision making characteristics*

- Decisions that are binding on both parties, with no right of appeal, once accepted by consumers (but which do not constitute legal precedent)
- Decision making which begins by considering the legality of actions being complained about but which also features an equitable jurisdiction
- Decisions which consider the merits of the actions complained against in addition to the processes by which decisions were taken
- The use of flexible remedies (usually with a financial element) to provide fair and reasonable outcomes
- The use of expertise and industry knowledge to inform decision making in addition to the law
- The ability to facilitate, propose and impose solutions as part of their processes

### *Governance characteristics*

- Governance arrangements ensure independence from industries and businesses under jurisdiction
- Can either be set up by industry (self-regulatory), by regulators (mandated self-regulatory) or the legislature (statutory)
- Funding comes from the industry through case fees and/or levies
- Tend to be considered closer to the self-regulatory or regulatory system than the justice system
- The figure of the ombudsman allows for higher visibility and greater accountability

## **Limits**

The role of consumer ombudsmen is limited as follows:

- While their decisions and other activities may influence the practices of those subject to investigation, consumer ombudsmen cannot provide authoritative and binding legal precedents such as those that could be issued by a court
- While consumer ombudsmen have a special role in terms of providing direction to bodies subject to investigation about the requirements of fairness beyond minimum regulatory standards, they cannot create regulatory rules or standards
- While consumer ombudsmen are able to provide advice to consumers in relation to the handling of disputes and may seek to manage consumers' expectations, they should stop short of providing advice on the substantive merits of cases, since to do so could prejudice subsequent decision making and give the appearance of prejudgment and bias
- While consumer ombudsmen have a particular responsibility towards vulnerable consumers and must assist all consumers to present their best possible case, they must remain impartial and cannot advocate for the consumer

To conclude, therefore, our description of consumer ombudsmen in the UK has three dimensions. Consumer ombudsmen can be described as those independent dispute resolution bodies that:

- (1) meet the Ombudsman Association's current criteria for membership as an 'ombudsman member'
- (2) meet the European Commission's principles and criteria for consumer dispute resolution, and
- (3) demonstrate the functions, forms and limits we have described above.

This description is offered with some important caveats. In particular, it is based on a review of the literature, a small number of expert interviews and our own understanding of consumer ombudsmen. While these have been helpful in elucidating some of the key features of consumer ombudsmen, empirical fieldwork is required in order to explore the extent to which the characteristics we have outlined exist in practice. There may be a difference between what commentators, practitioners and academics (and the report's authors) think consumer ombudsman *should* be doing and what they *are* doing in practice.

We also recognise that the description we have provided is limited to presenting the dominant features of consumer ombudsmen in the UK. In trying to provide a descriptive summary, and given the diversity of practice that exists in this sector, there will inevitably be room for debate in relation to whether the features we identify do (or should) apply equally to all consumer ombudsmen. Questions may also be raised about how 'essential' the

features we have identified are; even if they accurately represent current approaches, could different approaches be adopted in future?

We recognise, therefore, given the small scale of this project, that our conclusions are necessarily tentative and limited in scope. There is significant potential for further research and analysis to reach a fuller empirical understanding of the functions, forms and limits of consumer ombudsmen in the UK. There is also room for further debate and discussion around which of the features we have identified are truly *essential* to the consumer ombudsman model and which ones may be seen as *peripheral*. Rather than seeking to bring debate and discussion over the role of consumer ombudsmen to a definitive end, therefore, we see this report as a means to facilitate further discussion and as a step in the road towards achieving shared understandings.

### **Annex 1 - characteristics of consumer ombudsmen mentioned by interviewees**

- Providing advice and assisting the most vulnerable
- Individual dispute resolution
- Raising standards amongst bodies subject to investigation
- Enhancing trust/ confidence amongst the public
- Independence
- Impartiality
- Transparency
- Private proceedings
- Flexible processes (combining telephone and paper based approaches)
- Inquisitorial processes
- A tiered process, with a menu of 'informal' and more 'formal' ways of resolving disputes
- Strong powers of investigation
- Rare use of hearings
- Free to the complainant
- Equitable (fairness) jurisdiction
- Informality
- Ability to publish decisions and case outcomes



**OMBUDSMAN ASSOCIATION**

**SCHEDULE 1 TO THE RULES**

**CRITERIA FOR THE RECOGNITION OF OMBUDSMAN OFFICES**

**A. GUIDING PRINCIPLES**

The Association will afford recognition as Ombudsman Offices to those bodies whose core role is to investigate and resolve, determine or make recommendations with regard to complaints against those whom the Ombudsman is empowered to investigate; and which meet the detailed Criteria set out below.

The Association will only give recognition to Ombudsman's Offices whose primary role is to handle complaints by individuals about maladministration, unfair treatment, poor service or other inequitable conduct by those subject to investigation.

The Association recognises and values the wide range of Ombudsmen schemes in the public and private sectors and the variations in their constitution, jurisdiction, powers and accountability. The Criteria for Recognition of Ombudsman's Offices have been drawn up with that in mind and the Association will apply the Criteria with sufficient flexibility to encompass those variations.

The Association expects users of Ombudsman schemes in the public and private sectors to have comprehensive and coherent coverage and clear and simple access to Ombudsmen and will take account of this when considering applications for membership of the Association.

In the case of private sector schemes, the Association is opposed to the fragmentation of redress schemes within a single industry. The Association prefers there to be a single Ombudsman within an industry. Where more than one scheme is established within an industry, the Association will normally only afford recognition to the scheme or schemes to which a substantial number of firms in the industry belong.

**Criteria**

The Association's Criteria for the Recognition of Ombudsman Offices are set out in detail in Part B below. The five key Criteria are:

- Independence
- Fairness
- Effectiveness

- Openness and transparency
- Accountability

## **Governance**

The Association expects Ombudsman Members to comply with its Principles of Good Governance (and any amendments thereto).

## **Principles of Good Complaint Handling**

The Association expects Ombudsman Members to operate in accordance with its Principles of Good Complaint Handling (and any amendments thereto).

## **Use of the title of 'Ombudsman'**

The title of 'Ombudsman' should not be used unless the Association's Criteria for Recognition of Ombudsman's Offices are met. The Association will not admit to Membership in any category organisations or individuals which use the title of 'Ombudsman' but do not meet the Association's Criteria.

The Association also hopes that, in the interests of users, organisations which meet the Criteria for Recognition of Ombudsman's Offices will use the title of 'Ombudsman' unless there is a good reason not to do so.

## **Recognition**

The decision on whether a scheme is recognised as meeting the Criteria will be made at the discretion of the Executive Committee or by a General Meeting of the Association on the recommendation of the Validation Committee.

## **Review**

The Validation Committee will also, when requested to do so by the Executive Committee or a General Meeting of the Association, review whether existing Ombudsman Members continue to meet the Criteria for Recognition and advise the Executive Committee accordingly.

## **PART B CRITERIA**

### **1. Independence**

(a) The Ombudsman must be visibly and demonstrably independent from those whom the Ombudsman has the power to investigate.

(b) The persons who appoint the Ombudsman should be independent of those subject to investigation by the Ombudsman. This does not exclude minority representation of those

subject to investigation on the appointing body, provided that the body is entitled to appoint by majority decision.

(c) The term of office should be of sufficient duration not to undermine independence. The appointment should be for a minimum of five years. It may be subject to renewal but the renewal process should not undermine or compromise the office holder's independence.

(d) The remuneration of the Ombudsman should not be subject to suspension or reduction by those subject to investigation, but this does not exclude their minority representation on the body authorised to determine it.

(e) The appointment must not be subject to premature termination other than for incapacity or misconduct or other good cause. The grounds on which dismissal can be made should always be stated, although the nature of the grounds may vary from scheme to scheme. Those subject to investigation by the Ombudsman should not be entitled to exercise the power to terminate the Ombudsman's appointment, but this does not exclude their minority representation on the body which is authorised to terminate.

(f) The Ombudsman alone (or someone acting on his or her authority) must have the power to decide whether or not a complaint is within the Ombudsman's jurisdiction. If it is, the Ombudsman (or someone acting on his or her authority) must have the power to determine it. The Ombudsman's determination should be final and should not be able to be overturned other than by the courts or an appeal route provided for by law.

(g) Unless otherwise determined by statute the Ombudsman should be accountable to report to a body independent of those subject to investigation, but this does not exclude their minority representation on that body. That body should also be responsible for safeguarding the independence of the Ombudsman.

## **2. Fairness**

(a) The Ombudsman should be impartial, proceed fairly and act in accordance with the principles of natural justice.

(b) The Ombudsman should make reasoned decisions in accordance with what is fair in all the circumstances, having regard to principles of law, to good practice and to any inequitable conduct or maladministration.

(c) In all cases where it is decided not to accept the complaint for investigation, the Ombudsman should notify the complainant of that decision and the reasons for it.

(d) In all cases investigated, the Ombudsman should notify the parties concerned of the decision and the reasons for it.

### **3. Effectiveness**

(a) The office of the Ombudsman must be adequately staffed and funded, either by those subject to investigation or from public funds, so that complaints can be effectively and expeditiously investigated and resolved.

(b) The Ombudsman should expect those subject to investigation to have accessible and fair internal complaints procedures.

#### **(c) Accessibility**

(i) The right to complain to the Ombudsman should be adequately publicised by those subject to investigation.

(ii) Complainants should normally have direct access to the Ombudsman scheme. If, exceptionally, this is prevented by law, the Ombudsman should seek to minimise the adverse impact on complainants.

(iii) The Ombudsman's procedures should be straightforward for complainants to understand and use.

(iv) Those complaining to the Ombudsman should be entitled to do so free of charge.

#### **(d) Powers and procedures**

The Ombudsman should:

(i) Be entitled to investigate any complaint made to the Ombudsman which is within the Ombudsman's jurisdiction without the need for any prior consent of the person or body against whom the complaint is made. This does not preclude a requirement that before the Ombudsman commences an investigation, the complainant should first have exhausted the internal complaints procedures of the person or body being investigated.

(ii) Save as otherwise provided by law, have the right to require all relevant information, documents and other materials from those subject to investigation.

(iii) Be entitled but not obliged, to disclose to the complainant or to the person being investigated such information, documents and other materials as shall have been obtained by the Ombudsman from the other of them unless there shall be some special reason for not making such disclosure, for example, where sensitive information is involved or disclosure would be a breach of the law.

#### **(e) Implementation of Decisions**

Either

(i) Those investigated should be bound by the decisions or recommendations of the Ombudsman; or

(ii) There should be a reasonable expectation that the Ombudsman's decisions or recommendations will be complied with. In all those cases where they are not complied with, the Ombudsman should have the power to publicise, or require the publication of such non-compliance at the expense of those investigated.

#### **4. Openness and transparency**

(a) The Ombudsman's Office should ensure openness and transparency so that members of the public and other stakeholders know why the scheme exists, what it does and what to expect from it; and can have confidence in the decision making and management processes of the scheme.

(b) Information in the public domain should include a clear explanation of an Ombudsman scheme's legal constitution, governance and funding arrangements.

(c) The jurisdiction, the powers and the method of appointment of the Ombudsman should be matters of public knowledge.

(d) The Ombudsman should be entitled in the Annual Report, or elsewhere, to publish anonymised reports of investigations.

#### **5. Accountability**

(a) The Ombudsman, staff members and members of any governing body should be seen to be responsible and accountable for their decisions and actions, including the stewardship of funds.

(b) The Ombudsman should publish an Annual Report and Annual Accounts.

### **OMBUDSMAN ASSOCIATION**

#### **SCHEDULE 2 TO THE RULES**

#### **REQUIREMENTS FOR COMPLAINT HANDLER MEMBERSHIP**

##### **1. Eligibility**

The Association will admit to Membership as Complaint Handler Members organisations which:

- Have complaint handling as a significant part of their role.
- Operate in accordance with the Association's Principles of Good Complaint Handling, specifically:

- o Clarity of purpose
- o Accessibility
- o Flexibility
- o Openness and transparency
- o Proportionality
- o Efficiency
- o Quality outcomes
- Do not meet the Association's Criteria for Recognition of Ombudsman's Offices.

Purely commercial complaint handling bodies will not normally be eligible for membership.

## **2. Principles of Good Complaint Handling**

The Association expects Complaint Handler Members to operate in accordance with its Principles of Good Complaint Handling (and any amendments thereto).

## **3. Governance**

The Association expects Complaint Handler Members to have regard to its Principles of Good Governance (and any amendments thereto), where the constitution of the organisation allows them to do so.

## **4. Use of the title of 'Ombudsman'**

The title of 'Ombudsman' should not be used unless the Association's Criteria for Recognition of Ombudsman's Offices are met. The Association will not admit to membership organisations which use the title of 'Ombudsman' but do not meet the Association's Criteria.

## **5. Admission to Membership**

The decision on whether an organisation is admitted to Complaint Handler Membership will be made at the discretion of the Executive Committee or by a General Meeting of the Association on the recommendation of the Validation Committee.

## **6. Review**

The Validation Committee will also, when requested to do so by the Executive Committee or a General Meeting of the Association, review whether existing Complaint Handler Members continue to meet the requirements for Complaint Handler Membership and advise the Executive Committee accordingly.

**International Ombudsman Institute (IOI)**

Relevant extracts from The Bylaws (adopted on 13 November 2012)

**Article 2**

**Purpose and Principles**

(1) The purpose of the IOI, whose activities are of a non-profit making nature, is to contribute to

- respect for human rights and fundamental freedoms,
- adherence to the rule of law,
- effective democracy,
- administrative justice and procedural fairness in public organizations,
- improving public services,
- open and accountable government, and
- access to justice for all

by promoting the concept and institution of ombudsman and encouraging its development throughout the world.

(2) In pursuing this purpose, the IOI and its members recognize the following principles as the expression of an International Ombudsman Standard and require observance of them by any ombudsman institution:

a) it should be provided for by a Country, State, Regional or Local Constitution and/or an Act of a Legislature, or by international treaty,

b) its role should be to seek to protect any person or body of persons against maladministration, violation of rights, unfairness, abuse, corruption, or any injustice caused by a public authority, or official acting or appearing to act in a public capacity, or officials of a body providing devolved, partially or fully privatized public services or services outsourced from a government entity, and which could also function as an alternative dispute resolution mechanism,

c) it should operate in a climate of confidentiality and impartiality to the extent its governing legislation mandates, but should otherwise encourage free and frank exchanges designed to promote open government,

- d) it should not receive any direction from any public authority which would compromise its independence and should perform its functions independently of any public authority over which jurisdiction is held,
- e) it should have the necessary powers and means to investigate complaints by any person or body of persons who considers that an act done or omitted, or any decision, advice or recommendation made by any public authority within its jurisdiction has resulted in the kind of action specified in paragraph 2 (b),
- f) it should have the power to make recommendations in order to remedy or prevent any of the conduct described in paragraph 2 (b) and, where appropriate, to propose administrative or legislative reforms for better governance,
- g) it should be held accountable by reporting publicly to a Legislature, or other elected body, and by the publication of an annual or other periodic report,
- h) its incumbent or incumbents should be elected or appointed by a Legislature or other elected body, or with its approval for a defined period of time in accordance with the relevant legislation or Constitution,
- i) its incumbent or incumbents should only be dismissed by a Legislature or other elected body or with its approval for cause as provided by the relevant legislation or Constitution, and
- j) it should have adequate funding to fulfill its functions.

## **Article 6**

### **Membership**

- (1) Any institution, organization or individual which supports the purpose and principles expressed in Article 2 shall be eligible to be a member of the IOI.
- (2) Any public institution with international, national, regional or local jurisdiction shall be eligible to become a Voting member provided it:
  - a) substantially demonstrates that it has achieved the purpose and principles enshrined in Article 2, in conformity with the Country, State, Regional or Local constitution or legislation.
  - b) receives and investigates complaints from individuals against the administrative practices of public authorities or public undertakings, and
  - c) is functionally independent of any public authority over which jurisdiction is held.



(3) The Secretary General will, as outlined in Article 21.4 (n), review with each Voting member what progress has been made in fulfilling the requirements of the International Ombudsman Standard as expressed in Article 2.

(4) Honorary Life Membership may be granted by the Board to an individual who has made an exceptional contribution in respect of the purposes of the IOI or who has rendered outstanding services to the organization as long as he/she maintains common or compatible interests with the IOI regarding the purpose and principles set out in Article 2.

(5) A library or scientific establishment interested in the publications of the IOI and the publications of its members shall be eligible to become a Library member.

(6) Existing Institutional members of the IOI who are in good standing at the date of the adoption of these By-laws shall have their voting rights preserved.

**DG SANCO Criteria for the independence of ADR entities (from the Ombudsman Association Review)**

**Independence**

The ADR body needs to be independent of both consumers and those complained about (in the case of energy both suppliers and distributors) and must demonstrate this by its governance, reporting of its activities and impartiality of decision-making.

**Ease of Access**

The ADR scheme should be easily accessible by any consumer wishing to complain, having already allowed the industry member an adequate opportunity to resolve the problem(s). The timescale constituting the appropriate opportunity to resolve would need to be defined by the Member State.

**Performance Assessment**

The Member State may wish to develop key performance indicators (KPIs) which would allow consumers, the relevant regulator(s) and the industry to assess the performance of the ADR body. The Member State may also require the ADR scheme to use of the existing Commission harmonised system of complaint classification to ensure improved understanding of how the market functions amongst stakeholders.

**Effectiveness**

The Member State should ensure that the key elements of the ADR scheme are consistency, fairness and robustness of decisions and timeliness of decisions. If specified by national requirements, compliance with the decisions by industry (ie the timely implementation of the decision).

**Funding**

Member States should ensure that there are adequate funds made available to the ADR scheme in order to support the body's independence and any fee payable by consumers should not impede their access to the scheme. In principle, there are two main funding routes:-

- central funding from government; or
- funding from industry by some combination of subscription/membership fee for the scheme and a fee for each case accepted by the body.

### **Special Accessibility**

Given general fairness for all consumers, Member States should determine whether and, if so how, special attention needs to be given to certain groups of the population, such as vulnerable consumers, where extra assistance needs to be provided so that they are able to take advantage of the existence of an ADR scheme.

### **Information & Awareness**

In order to facilitate public knowledge and understanding not only the existence of the scheme but also both general assessment of the effectiveness of the ADR body and to assist consumers in making best use of the scheme, Member States may wish to require the ADR body to make a range of information publicly available for these purposes.

### **System Design & Operation**

Establish a step-by-step process (defining who does what, when and what the timescales are), its scope and ensure that branding is in place which effectively communicates the existence of the scheme, its functions (and limitations) and its use by complainants to the general public.

### **Independence, Impartiality & Transparency**

The ADR Body's governance must make clear that it is independent of consumers and the industry, its decisions are impartial and its reporting is transparent. Regular reporting of results, subject to appropriate confidentiality, should assist in improving industry performance and in increasing consumer confidence in the scheme.

### **Stocktaking**

The ADR Body should meet and engage regularly with its stakeholders to discuss results, improvements to both its performance and that of the industry companies, and also as a means to heighten the scheme's public profile and, in general, to increase awareness of the benefits of ADR schemes for other sectors.

## Annex 5 – summary of shared features and distinguishing characteristics

### Comparison 1: consumer ombudsmen and courts

Shared characteristics	Consumer ombudsmen distinctions
<p><i>Functions</i></p> <ul style="list-style-type: none"> <li>• Resolve individual disputes</li> </ul>	<p><i>Functions</i></p> <ul style="list-style-type: none"> <li>• Provide advice and support to consumers in relation to their complaint</li> <li>• Provide feedback to industry and seek to raise standards</li> <li>• Have a special concern for vulnerable consumers</li> </ul>
<p><i>Process characteristics</i></p> <ul style="list-style-type: none"> <li>• Impartiality</li> </ul>	<p><i>Process characteristics</i></p> <ul style="list-style-type: none"> <li>• Are confidential and conduct processes in private</li> <li>• Are more accessible, as a result of their advisory functions and inquisitorial approach</li> <li>• Are free to the consumer</li> <li>• Are inquisitorial, with strong powers of investigation</li> <li>• Employ a multi-process approach, which can be used flexibly</li> <li>• Rarely use oral hearings, and are paper and telephone based</li> <li>• Do not require legal or other kinds of representation</li> </ul>
<p><i>Decision making characteristics</i></p> <ul style="list-style-type: none"> <li>• Binding decisions</li> <li>• Consider legality of actions</li> </ul>	<p><i>Decision making characteristics</i></p> <ul style="list-style-type: none"> <li>• Make decisions which are not binding unless accepted by the consumer</li> <li>• Make decisions that draw on expertise/industry knowledge</li> <li>• Have an equitable, 'fair and reasonable', jurisdiction</li> <li>• Can draw on a wider range of remedies (such as the provision of apologies and explanations)</li> <li>• Generally cannot have their decisions appealed to a court</li> <li>• Do not have the potential to set precedent</li> </ul>
<p><i>Governance characteristics</i></p> <ul style="list-style-type: none"> <li>• Independence</li> </ul>	<p><i>Governance characteristics</i></p> <ul style="list-style-type: none"> <li>• Are funded by the industry</li> <li>• Can be self-regulatory, mandated self-regulatory or statutory</li> <li>• In regulated areas, are seen as part of the regulatory rather than justice system</li> </ul>

## Comparison 2: consumer ombudsmen and consensual dispute resolution

Shared characteristics	Consumer ombudsmen distinctions
<p><i>Functions</i></p> <ul style="list-style-type: none"> <li>• Resolve individual disputes</li> </ul>	<p><i>Functions</i></p> <ul style="list-style-type: none"> <li>• Provide advice and support to consumers in relation to their complaint</li> <li>• Provide feedback to industry and seek to raise standards</li> <li>• Have a more explicit role in addressing power imbalances between parties</li> </ul>
<p><i>Process characteristics</i></p> <ul style="list-style-type: none"> <li>• Impartial</li> <li>• Use mediation, conciliation and/or negotiation techniques</li> <li>• More consensual than courts</li> </ul>	<p><i>Process characteristics</i></p> <ul style="list-style-type: none"> <li>• Are more directive, interventionist and evaluative in approach</li> <li>• Have less procedural flexibility</li> <li>• Employ a multi-process approach</li> <li>• Are inquisitorial, with strong powers of investigation</li> </ul>
<p><i>Decision making characteristics</i></p> <ul style="list-style-type: none"> <li>• Can produce solutions agreed by parties</li> <li>• Agreements can be binding on parties</li> </ul>	<p><i>Decision making characteristics</i></p> <ul style="list-style-type: none"> <li>• Are adjudicative bodies, empowered to impose decisions</li> <li>• Have an equitable, 'fair and reasonable', jurisdiction (which means fairness must be taken into account in reaching solutions)</li> <li>• Must take account of the law when reaching solutions</li> </ul>
<p><i>Governance characteristics</i></p> <ul style="list-style-type: none"> <li>• Independence</li> </ul>	<p><i>Governance characteristics</i></p> <p>N/a.</p>

### Comparison 3: consumer ombudsmen and other forms of consumer dispute resolution

Shared characteristics	Consumer ombudsmen distinctions
<p><i>Functions</i></p> <ul style="list-style-type: none"> <li>• Resolve individual disputes</li> </ul>	<p><i>Functions</i></p> <ul style="list-style-type: none"> <li>• Provide advice and support to consumers in relation to their complaint</li> <li>• Provide feedback to industry and seek to raise standards</li> <li>• Have a more explicit role in addressing power imbalances between parties</li> <li>• Have a special concern for vulnerable consumers</li> </ul>
<p><i>Process characteristics</i></p> <ul style="list-style-type: none"> <li>• Impartiality</li> <li>• More flexible, quicker, cheaper than courts</li> <li>• May either facilitate, propose or impose a solution</li> <li>• Free to consumer (or nominal cost)</li> </ul>	<p><i>Process characteristics</i></p> <ul style="list-style-type: none"> <li>• Are more inquisitorial and have strong powers of investigation</li> <li>• Employ a multi-process approach</li> <li>• Are more accessible, as a result of their advisory functions and inquisitorial approach</li> </ul>
<p><i>Decision making characteristics</i></p> <ul style="list-style-type: none"> <li>• Expertise</li> <li>• Consider the legal merits of cases</li> </ul>	<p><i>Decision making characteristics</i></p> <ul style="list-style-type: none"> <li>• Unlike some consumer dispute resolution mechanisms (which can only facilitate or propose solutions) consumer ombudsmen make binding decisions</li> <li>• More likely to have equitable jurisdiction, rather than being limited to strict legality</li> </ul>
<p><i>Governance characteristics</i></p> <ul style="list-style-type: none"> <li>• Independence</li> <li>• Paid for by industry</li> </ul>	<p><i>Governance characteristics</i></p> <ul style="list-style-type: none"> <li>• Are more visible and accountable as a result of the figure of the ombudsman</li> </ul>

#### Comparison 4: consumer ombudsmen and public ombudsmen

Shared characteristics	Consumer ombudsmen distinctions
<p><i>Functions</i></p> <ul style="list-style-type: none"> <li>• Resolve individual disputes</li> <li>• Accessible, provide advice</li> <li>• Raise standards in industries</li> </ul>	<p><i>Functions</i></p> <ul style="list-style-type: none"> <li>• Have less emphasis on raising standards</li> <li>• Come closer to being a strict alternative to courts, as a result of their ability to consider the legal merits of actions and their power to take binding decisions</li> </ul>
<p><i>Process characteristics</i></p> <ul style="list-style-type: none"> <li>• Impartiality</li> <li>• Inquisitorial, few hearings</li> <li>• Procedural flexibility</li> <li>• Do not require representation</li> <li>• Paper and phone based procedure</li> <li>• Free to user</li> <li>• Usually available after complaint raised with organisation</li> </ul>	<p><i>Process characteristics</i></p> <ul style="list-style-type: none"> <li>• Are less inquisitorial</li> <li>• Often feature formal internal appeals</li> </ul>
<p><i>Decision making characteristics</i></p> <ul style="list-style-type: none"> <li>• Use extra legal standards</li> <li>• Supplementary remedies to the courts</li> </ul>	<p><i>Decision making characteristics</i></p> <ul style="list-style-type: none"> <li>• Make binding decisions</li> <li>• Consider and determine the merits of decisions/ actions</li> <li>• Use the fair and reasonable standard, rather than maladministration or service failure</li> <li>• Usually provide remedies that involve a financial element</li> </ul>
<p><i>Governance characteristics</i></p> <ul style="list-style-type: none"> <li>• Independence</li> </ul>	<p><i>Governance characteristics</i></p> <ul style="list-style-type: none"> <li>• Are industry funded</li> <li>• Are primarily accountable to regulators and/or self-regulatory mechanisms</li> <li>• May operate in a framework that allows competition with other ombudsmen</li> <li>• Tend to have some form of governing body or formal board</li> </ul>

## Annex 6 - References

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